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CONVEYANCER'S NOTEBOOK

Town and Country Planning Act.—The date announced for this Act coming into force is July 1, 1948 (the Appointed Day). In fact, some of its most drastic operation is already effective, namely, the valuation of land compulsorily acquired or acquired by agreement in respect of compulsory powers by a local authority: sections 55, 91 (2). The impact of the Act upon the law will only be felt by degrees for two reasons; first, the "plans" are likely to mature rather slowly and until then it is impossible to see how far the compulsory powers are exercised and affect the general law. Secondly, the immediate effect of "restricted use" will not be obvious and to some extent will be neglected in practice. If the restrictions are, in fact, enforced they will gradually take a more dominant place in conveyancing and generally in dispositions and interests in property.

Nevertheless, we still think that the Agriculture Act is the more important of the two Acts both from the point of view of the conveyancer and of the community generally. Judging from their reactions this does not appear to be the point of view of the profession and, of course, we may be wrong. The impact of the Planning Act is more obvious, and its immediate effect will be to affect in the main property dealers because, at least in some cases, 1939 values will have dropped in an astonishing way. At least this is the effect of the Act as at present claimed by district valuers, though it is difficult (in some cases) to see why. The vital point is that the land is in most cases unable to be developed without payment of a price for a licence to develop (called a development charge) that should correspond, at least to some extent, with the increased value of the *land*. Hence some persons who have bought land, expecting the value of the land to rise as it is used for different purposes, are to be disappointed of the results of their "intelligent anticipation". This gives an immediate appearance of importance in the land law, but to this extent it is largely fictitious and a matter for the estate agent rather than the lawyer. The real legal question here will be the decisions on "existing use". It is suggested that the notion that unbuilt-on land should always be treated as having an "existing use" as agricultural land is fallacious and should not be supported by the Courts, if the matter is argued

as a proper question of law outside the jargon of valuers and compulsory purchase cases which get lost in a tangle of technicalities so far irrelevant to the land law properly so called.

We only mention this matter here because it has a relation to the true scope of conveyancing and the substantive land law. It is important that the Courts should devise some method of defining "use" without relation to the questions of "value" which tend to obscure the true issue at the moment. The reason for this, of course, is that property owners generally, not merely property speculators, will wish to know the limits of restriction and prospective purchasers of property for their own use will need to have this knowledge also. "Material alteration" is one of those large vague expressions which without judicial determination can mean anything or nothing, and it is upon this that the question will ultimately rest. Even then it remains to be seen whether these restrictions will be effective and that enforcement will take serious shape. Obviously at this stage conveyancers must protect their clients, so far as they can, against this prospect, but how is the "material alteration" to be proved and by whom? And, indeed, how is it to be detected? Possibly some more form filling will arise and statistics grow, but this also remains for the future.

Since this paragraph was written the Town and Country Planning (General Development) Order, 1948 (SI 958/1948) and the Town and Country Planning (Use Classes) Order, 1948 (SI 954/1948) have been issued and lend more point to it. The view taken by the Ministry of what constitutes a material change of use is very restrictive. For example, it appears to think it necessary to give authorisation for change of use from one sort of shop to another and does not authorise change of such user to enable the shop to be a fried fish shop, tripe shop, shop for sale of pet animals or birds or a catsmeat shop. The use of premises for catering purposes other than "light refreshments" (defined by the Order) is also restricted. The social and economic implications of this power in the Ministry (if it exists) is too obvious to require comment and in any case does not directly concern us. These Orders, in fact, authorise generally many changes in user and a knowledge of the details will become very necessary. For example, gates, walls and fences not exceeding *seven feet* in height are authorised *unless* they afford access to or abut on a highway. Nevertheless two points require careful consideration. First, these Orders can be altered, revoked or amended at any time. Secondly, the Act does not appear to authorise the Minister to define "material change in the use" and the Courts may take the view that a restrictive provision should be restrictively construed. There is a good deal in the Act against such a restrictive interpretation, nevertheless there seems room for limiting the construction of the Act. Only the future can say.

The Agriculture Act, however, is a much more immediate problem. Quite apart from the extensive innovations in Agricultural Tenancies involving new forms of tenancy agreement the scope and immediate effect of the Act is drastic. Not only must purchasers seek to protect themselves against buying land that will not belong to them, but all forms of settlement and trusteeship must be reconsidered. It must never be forgotten that at all times the land is at the mercy of the authorities for want of good husbandry and good estate management

and this may mean loss not only to a tenant for life but also to remaindermen. Whatever we may think of the possibilities of enforcement in urban properties under the Planning Act no one with experience of the County Agricultural Committees and their servants will be under any delusion about the position in connection with agricultural land. And it will not be possible to turn agricultural land into anything else, because the planning scheme will see to that. We think that in time it will be realised that the Agriculture Act is the more important and the steps taken to regulate its impact more vital than in the case of the Planning Act.

Agriculture Act — notices — registration of interests. — Under Statutory Instrument 194/1948, the Agriculture (Registration of Interests in Land) Regulations, 1948, an application in the prescribed form can be made by an owner that notices should be served on him instead of the person having the management of the land: section 20 (1). A register is kept for this purpose and also for trustees and persons next entitled to the person in possession of settled land: section 16 (6) (b). A prescribed form for registration of the trustees, etc., is also provided.

APPLICATIONS FOR REGISTRATION UNDER SECTIONS 16 AND 20, AGRICULTURE ACT, 1947

PART I

.....COUNTY AGRICULTURAL EXECUTIVE COMMITTEE

Application for Registration as Owner

(Form I)

(1)	(2)	(3)	(4)
Particulars of all the agricultural land in the ownership of the applicant (*a*) with sufficient description (by reference, if necessary, to a map or plan on a suitable scale) (*b*) to identify the situation and extent of the land.	Full names and postal address of the owner. (BLOCK LETTERS)	Name of the occupier.	Date of registration (for official use only).

I have completed columns (1), (2) and (3) above, and will supply any further information that may be required.

I hereby declare that I am the owner (*c*) of the land described in column (1) hereof, and for the purpose of the proviso to subsection (1) of section 20 of the Agriculture Act, 1947, I apply to be entered on the register accordingly.

Signature.....

Date.....

Notes:—(*a*) If you own more than one agricultural unit, each one should be separately identified.

(*b*) It is not necessary to forward a map or plan unless it is thought to be desirable for identification purposes, or unless it is asked for by the Committee.

(*c*) If you are not the owner of the land, but are treated as the owner with the approval of the Committee or by a determination of the Agricultural Land Tribunal, state here the date of such approval or determination.....
If a date is filled in here, your declaration will be read as meaning that you are entitled to be treated as the owner accordingly.

PLEASE NOTIFY THE COMMITTEE OF ANY CHANGE OF ADDRESS

PART II

.....COUNTY AGRICULTURAL EXECUTIVE COMMITTEE

Application for Registration as Trustee or Person Interested under a Settlement

(Form II)

(1)	(2)	(3)	(4)	(5)
Particulars of all the agricultural land comprised in the settlement (*a*) with sufficient description (by reference, if necessary, to a map or plan on a suitable scale) (*b*) to identify the situation and extent of the land.	Full names and postal address of the person applying for registration (*c*). (BLOCK LETTERS)	Full names and postal addresses of all the Trustees of the Settlement (*d*). (BLOCK LETTERS)	Name of the occupier.	Date of registration (for official use only).

I have completed columns (1), (2), (3) and (4) above, and will supply any further information that may be required.

I hereby declare that I am interested in the land described in column (1) hereof as (*e*) .....
and for the purpose of paragraph (b) of subsection (6) of section 16 of the Agriculture Act, 1947, I apply to be entered on the register accordingly.

Signature.....

Date.....

Notes:—(*a*) If more than one agricultural unit is comprised in the settlement, each one should be separately identified.

(*b*) It is not necessary to forward a map or plan unless it is thought to be desirable for identification purposes, or unless it is asked for by the Committee.

(*c*) If you are applying as an infant who is beneficially entitled to the land in possession, state here the date of your birth

.....

(*d*) If you are applying as a trustee of a settlement, and have been duly authorised by the other trustees to apply for registration on their behalf also, you should then insert the names and addresses of the trustees in column (2), and not in column (3). If this is done, your declaration will be read as meaning that you, as one trustee, have been authorised to apply for registration on behalf of the other trustees also, and that you desire all the trustees named in column (2) to be entered on the register.

(*e*) Here insert, as may be appropriate, "a trustee of the settlement", "a person who under the settlement has a vested interest in the land immediately following upon the interest of the person beneficially entitled to the land in possession", or "an infant who is beneficially entitled to the land in possession".

PLEASE NOTIFY THE COMMITTEE OF ANY CHANGE OF ADDRESS

Town and Country Planning (Making of Applications) Regulations.—Statutory Instrument 711/1948 contains regulations for making applications for planning permissions, determination of development charges, confirmation of such charges, and variation of them. Under clause 2 a form of application for planning permission is issued by the local planning authority and obtainable from it or from the County Borough Council or County District Council with which it must be lodged on completion. The form will contain directions for the accompanying particulars required by the authority. In London applications must be made to the Common Council for the City of London and to the L.C.C. for other applications affecting property within the administrative county.

Under clauses 3, 4 and 5 application to make, confirm or vary development charges must be made to the Central Land Board. Applications for confirmation should be by letter setting out the circumstances addressed to the office of the Board from which the determination of the charge was made. Otherwise application must be made on the form issued by the Board accompanied by such particulars as appear from the form to be required, but in the case of a variation clause 5 of the Statutory Instrument sets out certain particulars which will be required. These particulars are as follows:—

(a) The development charge in respect of which the application is made.

(b) The grounds on which the application is made.

(c) Where the application is made by the person entitled to an interest in land to which a determination of development charge relates on the ground that a change of circumstance has taken place since the determination, particulars of such change of circumstance.

(d) Where an application is made on the ground that, after the determination of the amount of the development charge and before that amount has been fully discharged:—

(i) planning permission for the carrying out of the operations, or for the institution or continuance of the use, to which the determination relates,

has been modified by an order made under Section 21 of the Act, particulars of such order;

(ii) an order has been made under Section 26 of the Act requiring the alteration of any buildings or works erected or constructed in the carrying out of those operations, or imposing conditions on the continuance of that use, particulars of such order;

(iii) any part of the land to which the determination relates has been compulsorily acquired under the Act or any other enactment, particulars of such compulsory acquisition.

(e) The manner in which the applicant desires that the determination to which the application relates should be varied.

(f) The manner in which the applicant desires any covenants or charges made or given in respect of the determination should be amended, discharged or released.

(g) Such other material particulars as are requisite for considering the application.

Under clause 6 the Board has power to require further information or evidence.

Development by conversion into flats.—The note on p. 169 (*ante*) and the footnote (*b*) of Form 9 on p. 337 (December issue) are misleading and wrong. The purpose of the note was to call attention to the difficulties under section 12 of the Town and Country Planning Act, 1947, of determining the exact limits of "development" in the absence of any adequate definition, *e.g.*, of "dwelling-house". The note should not have referred to a "development charge" because in this particular instance it seems that no development charge will be payable at present by reason of Part I of the Third Schedule referred to by our correspondents on p. 169. It is thought that the Third Schedule has no bearing on section 12 of the Act requiring planning permission and, indeed, only relates to "development" where it is specifically referred to in the Act, as, for example, that compensation is payable under section 20 of the Act for refusal to grant a planning permission except for those forms of development mentioned in Part I of the Schedule. It so happens that use as two or more dwelling-houses which on the Appointed Day were used as a single dwelling-house falls into Part I and, therefore, refusal of a planning permission does not carry with it the right to compensation as it would if it fell within Part II of the Third Schedule. The result consequently appears to be as follows: (i) planning permission must be obtained to convert a single dwelling-house into two or more dwelling-houses; (ii) failure to obtain such consent does not entitle the applicant to any compensation under section 20 of the Act; (iii) if consent is obtained the applicant is not required to pay a development charge under Part VII by virtue of section 69 (2) (a) *provided* that the *building* was used as a *single* dwelling-house *on the Appointed Day*, but no such proviso, of course, appears in section 12 (3) (a).

Furthermore, the effect of section 61 (2) (a) may be to exclude the possibility of such conversion from any claim on the global sum available under Part VI because of the assumption that permission would be granted. If permission is deemed to be granted presumably there can be no loss since no development charge is payable.

We cannot leave this question without pointing out that the footnote (*b*) referred to above is not without point even on the subject

of " conversion ". Neither section 12 (3) (a) nor Part I, para. 2 of the Third Schedule refer expressly to any form of conversion other than that of a *single* dwelling-house into two or more dwelling-houses. It, therefore, remains to be shown whether a divided house can be sub-divided on the same conditions. There are two problems. First, if on the Appointed Day the owner of Park Row has " let off " the top flat and, then, subsequently wishes to subdivide the rest of the house does this fall within section 12 (3) (a) ? The provision in section 12 (3) (a) refers to " the use as two or more separate dwelling-houses of any *building* previously used as a *single* dwelling-house ". " Building " is defined by section 119 (1) to include " any structure or erection and any *part* of a building ". Therefore, it may well be argued that all but the top floor flat was " a part of a building used as a single dwelling-house " and that section 12 (3) (a) includes the use of part of a dwelling-house as a single dwelling-house. If this is correct it applies also to Part I of the Third Schedule as there appears to be no material difference of phraseology.

The second point is not of such immediate concern because it can only arise some time after the Act. If after the Appointed Day a planning permission is obtained to convert the top floor into a flat and then, subsequently, it is desired to convert the lower floors into flats, how far do these provisions apply? If the lower floor is treated as a building used as a separate dwelling-house in our first case presumably it must be so treated. Hence planning permission will be regarded as necessary, if, indeed, section 12 (3) (a) cannot be regarded as a provision inserted *ex abundante cautela* and that such permission would in any case be required by reason of a material alteration in the user. On the other hand it is difficult to apply Part I of the Third Schedule. The part of the building now sought to be converted was not used as a single dwelling-house on the Appointed Day, it was used as part of a single dwelling-house. The result appears that such a conversion falls outside the Third Schedule altogether and takes its place with any other ordinary " developments ". It could be exempted from a development charge by regulation under section 69 (2) (b), but, unless this is done, it appears to be liable to bear such a charge.

In fact we think that this interpretation, though obviously possible and perhaps correct, was not intended. We doubt very much whether the sub-division of a house already divided into flats was contemplated as being within Part I of the Third Schedule at all. And we should like to know what the draftsman meant and the Judges will hold that he meant by " separate dwelling-house " when it is possible to run the gamut between a lodger occupying a separate room (clearly not a " dwelling-house ") and buildings joined by a single passage or doorway. The point may arise at once. A private dwelling-house turned into a boarding-house seems a material change in user (now see SI 1948/954 Sched. Class XIV).

In the meantime we offer our apology to subscribers for misleading them.

LAND REGISTRATION FEES

The Lord Chancellor with the advice of the Rule Committee has made an Order under section 145 of the Land Registration Act, 1925, annulling the Land Registration Fee Order, 1939 (S. R. & O. 1939, No. 809) and restoring to operation the fees prescribed by the Land Registration Fee Order, 1930 (S. R. & O. 1930, No. 220). The Order operates with effect from April 1, 1948.

As important as the reduction of fees, is the abolition, as a result of the new Order, of the separate scales of fees for first registrations and dealings for value with land in the voluntary areas. This simplification will facilitate the correct calculation of fees.

OFFICIAL SEARCHES OF THE INDEX MAP IN COMPULSORY AREAS

The Chief Land Registrar announces that he is able again to exercise the discretion vested in him by abatement No. 9 of the Land Registration Fee Order, 1930, and to remit the fee prescribed by paragraph 12 (6) (a) for an Official Search of the Index Map, in compulsory areas.

SETTLEMENTS ON SETTLOR'S INFANT CHILDREN

We have received the following letter from a subscriber :—

Your issue of March, 1948, contains an article and two precedents which prompt me to the following queries :—

1. *Efficacy of Mr. Bodkin's form of Settlement as a Tax-saving Measure.*

The precedents are described as " Settlement on trust for sale of freeholds for the benefit of infant children to avoid income tax and surtax ".

The odd thing is that I can find no reference in this headnote, nor in Mr. Bodkin's footnotes, to section 21, Finance Act, 1936. I need not quote the section as Mr. Miller does it for me at the beginning of his article.

A good many of us have been telling our clients for some years that under post–1936 settlements of this nature, they are obliged to pay surtax on the income of their (infant unmarried) children under section 21 if they draw it from the trust for maintenance : such income is to be " treated as the income of the settlor ". But Mr. Bodkin is at some pains to include in his form (clause 2 (2)) a rather long and elaborate maintenance clause, which would seem to suggest—when read with the headnote—that income paid to the settlor under this clause somehow escapes the operation of section 21. Would it in fact do so?

The efficacy of this form of settlement, if I understand it correctly, depends upon a strict adherence by the trustees to the trust for accumulation of income (clause 2 (3)). Though expressed as a trust to accumulate " the residue (if any) of the income ", it is presumably the intention that the whole should be accumulated until the

vesting date. If it was Mr. Bodkin's intention to give us a precedent confirming relief from surtax on *spendable* income—and the power to spend is surely of importance—then one would like to know how the operation of section 21 is avoided. If, on the other hand, this is, as I think, a scheme which rests upon the willingness of the settlor to " say goodbye " to the trust income and to let it accumulate, perhaps the point should receive a little more publicity.

On the income tax side, I cannot fathom how the settlor " avoids income tax "—except at the price of the income on which that tax is payable. Presumably the children would reclaim tax for past years on vesting as was done in *Dale* v. *Mitcalf*, but this seems to be hardly the same thing as " avoidance of income tax " by the settlor. Of course if a person gives up his income he is in one sense " avoiding income tax " in the same way as one " avoids estate duty " by an outright gift and five years' survivorship. Unfortunately the lay client usually wants to keep the income and avoid the tax! Only a scheme which enables him to have the best of both worlds in this sense does, I think, justify the description that it " avoids income tax ".

2. *Validity of the trust for accumulation of income.*

Mr. Miller's article recommends a trust for accumulation of income during the life of the settlor or until the beneficiary attains twenty-two years of age, " whichever period be the shorter ". The precedent adopts much the same formula, but with the addition (*ex abundante cautela?*) of a reference to the possible death of the beneficiary. But, as the article points out, apart from the statutory powers of accumulation contained in section 31, Trustee Act, 1925, the draftsman is limited to one of the selective periods prescribed by section 164, Law of Property Act, 1925. Section 164 lays down " the duration of the minority " of (in effect) the principal beneficiary as one of these selective periods. If we exclude from consideration persons domiciled abroad, the section may mean any period up to twenty-one years according to the age of the child at the date of the settlement, but it cannot conceivably mean more than twenty-one years.

I feel confident that there must be some very elementary answer to this enigma, but your learned contributor Mr. Miller rests his " twenty-two years " on a section which, in effect, says " twenty-one years " and the answer at present eludes me.

The point would seem to be of some practical consequence because if the accumulation period permitted by section 164 is exceeded, it would be void as to the excess : such part of the trust income in the final trust year, as is freed from the compulsion to accumulate, would (until April 5 following his majority) belong to a beneficiary who " at the commencement of that year was an infant and unmarried " and the settlor would be assessable under section 21, Finance Act, 1936.

3. *Provisions of section* 98, *Finance Act*, 1938, *relating to " undistributed income ".*

Amongst the exemptions quoted by Mr. Miller to the charge created by subsection (3) of this section is " the death under that age of a beneficiary entitled at twenty-five years ".

Other readers besides myself may have wondered how the ultimate

trust in favour of the settlor (precedent—clause 2 (9)) escapes the operation of this section. The answer would seem to be that the exemption has not been fully quoted by Mr. Miller. Subsection (4) (a) (iv) refers to "the death under the age of twenty-five *or some lower age* of some person who would be beneficially entitled . . . on attaining that age".

Mr. Bodkin writes:—

1. Income applied under the power of maintenance in the precedent will under section 21 of the Finance Act, 1936, be treated as the settlor's income for income tax and surtax purposes. There is no means of avoiding this result. The precedent does not attempt to do so. The intention is that the whole income shall be accumulated; but it was considered better to give the trustees a power to apply it for maintenance if this proved necessary, rather than to have an express trust for accumulation. The point was dealt with fully in the article and precedents in Vol. 11, No. 2, of the *Conveyancer*, to which the present power was intended to be supplementary.
2. The period of accumulation adopted in the precedent is not the minority of the child but is limited by reference to the life of the settlor. This is permissible under section 164 of the Law of Property Act, 1925. The period of accumulation under the statutory power imported in clause 2 (4) of the precedent is permitted in addition to that of the settlor's life.
3. As pointed out in the footnote, the reservation of an interest to the settlor on the death of a child under the "specified age" (which is less than twenty-five years) is excepted from the cases under section 38 of the Finance Act, 1938, in which the settlor is deemed to have an interest in undistributed income, and it also does not prevent the settlor from having divested himself of the property within the meaning of section 28 of the Finance Act, 1946. The ultimate trust will not therefore render income liable to be treated as the settlor's income.

Mr. Miller's observations are as follows:—

2. *Validity of the trust for accumulation of income.*

Section 164 of the Law of Property Act, 1925, effectively authorises two alternative and exclusive periods of accumulation, *viz.*:—

(1) the settlor's life, or,

(2) as the writer points out, a period which cannot exceed twenty-one years.

Thus, although the settlor's life, from the date of execution of the settlement, may exceed the period of twenty-one years, no question as to the validity of this direction can arise. The direction to accumulate until the beneficiary attains twenty-two years is by the use of the words "whichever period be the shorter" made subject to this overriding and valid direction: thus accumulations under these express powers *cannot* continue for a period in excess of the "life of the

settlor " although they may cease within this permitted period, *i.e.*, at the point of time when the beneficiary attains twenty-two years of age.

3. *Provisions of section* 38, *Finance Act*, 1938, *relating to "undistributed income."*

I entirely agree with the writer's criticism and his answer thereto. I fear that on paraphrasing the statutory provision I inadvertently omitted the reference to the "lower age". It is, of course, a vital provision, and with your agreement I will make the necessary correction in the next of these articles.

We have received the following notice from the Probate Office :—

Probate—community of property.—Where, by the law of the place of domicil of the deceased, community of property exists between the spouses, the following concluding paragraph to the oath to lead the grant is appropriate and should be used :—

> " the whole of the estate in England in respect of which a grant is required amounts in value to the sum of . . . to the best of my knowledge, information and belief; and that . . . (half) . . . of that sum has accrued to the surviving spouse by reason of the existence of community of property under the law of the place of domicil of the said deceased."

The grant will be in respect of the whole estate, but a Court fee will be payable in respect of half of it only. The penalty in the bond, if any, will be in respect of half the estate.

A correspondent writes :—

I have read with interest the article in the September, 1947, issue of the *Conveyancer* by Mr. J. F. Garner on Statutory Charges on Land.

On p. 48 it is stated that notices to treat under the Acquisition of Land (Authorisation Procedure) Act, 1946, are registrable as land charges (local) in Part IV. Surely this is not correct. A notice to treat is an act of neutral character, with some of the characteristics of a contract. See *Cripps*, 8th ed., p. 59 *et seq.*

Even if it were a contract, would it be a registrable prohibition or restriction? I personally have never registered any of the several notices to treat which I have served under the 1946 Act.

Our contributor writes as follows :—

It seems reasonably clear that a notice to treat does not create a contract for sale; see, *e.g.*, *Cardiff Corporation* v. *Cook* (1923), 92 L. J. Ch. 177, and from this point of view, it is admittedly arguable that a notice to treat is not registrable as a local land charge. It is suggested, however, that such a notice, brought into being by the act of the acquiring authority, amounts to a very real restriction on the land, and should therefore be registered, although I agree with my inquirer in so far that I doubt whether the notice would be invalid if not registered. The restriction is such that the landowner cannot deal

with his land after service of the notice to treat so as to cast any additional expense on the acquiring authority (see, *e.g.*, *Re Marylebone Improvement Act* (1871), 40 L. J. Ch. 697).

Whenever the acquiring authority anticipates any appreciable delay between service of the notice to treat and completion of the purchase, it is submitted that the notice should be registered; this course is, to the writer's knowledge, taken by some local authorities, and is advised in the *Remembrancer of Local Land Charges*, published by the Society of Clerks of Urban District Councils (at p. 15).

THE USE OF LAND AND DEVELOPMENT

Under town and country planning schemes made under the 1932 Act, it was frequently difficult to decide whether or not a change of user of a particular building or plot of land amounted to development for the purposes of planning control, by reason of the wide terms in which the definitions of the various zones provided for in the scheme were drawn. These difficulties should not, however, be experienced to the same extent under the 1947 Act. A uniform planning scheme—or the equivalent thereof—will gradually be established for the whole country, and in furtherance of this policy, the Minister of Town and Country Planning has made an order under section 12 (2) (f) of the Act, particularising "Use Classes" (*a*). A change of user of a particular building or other land within any one of these twenty-two classes will not in future constitute development for the purposes of the Act, and so permission of the planning authority to make such change in user will not be necessary. This, however, will be subject to two provisos :—

(a) If an intending developer makes application to carry out certain development, the local planning authority may see fit to impose conditions restricting future changes of user, even as between different forms of user within the same class, as defined by the above order. Such restrictions would override the general permission impliedly granted by the order. It should be noted, however, that the Minister has advised local planning authorities (in Circular 42) that such restrictions would cause difficulties in valuation of the development charge to be paid, and therefore they are "to be deprecated unless such restrictions are really essential for the proper planning of the area in question".

(b) A particular use may be prohibited or ordered to be discontinued by the local planning authority under section 26 of the Act, although such action would normally attach a liability to pay compensation.

The Minister has also made an order (*b*), in practically identical terms to the order above mentioned, under paragraph 6 of the Third Schedule to the Act, the effect of which is to include in the definition of "existing use", any change of user within the same class for the purposes of the order. For such a change, therefore, no development

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(*a*) The Town and Country Planning (Use Classes) Order, 1948 (SI 1948, No. 954).
(*b*) The Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (SI 1948, No. 955).

charge will be payable (see section 69 of the Act), and the " restricted value " of the land for the purpose of claims to a share in the global sum in respect of loss in development value under Part VI of the Act, will be adjusted accordingly.

We would suggest to practitioners that these orders are of such vital importance, clarifying and to some extent mitigating the provisions of the Act, that they are worthy of detailed examination, and should be referred to constantly in practice.

Since the above note was written, a further Order of the first importance has been issued elaborating the detailed machinery of the Town and Country Planning Act, 1947, namely the Town and Country Planning (General Development) Order, 1948 (SI 1948, No. 958), the " opposite number ", in some respects, to the " general interim development orders " of the system under the 1932 Act. It is not possible here to do more than summarise its effect in the broadest possible terms, and again we would refer practitioners to the Order itself.

The operative provisions of the Order may be divided as follows :—

(a) Clauses providing for development, falling within any of twenty-one classes (see First Schedule), to rank as " permitted development ", the permission of the local planning authority or of the Minister not being necessary in respect thereof. This Order, it should be noted, deals with *development*, in the sense in which the term is used in the Act, and is not confined to " material change of user ", as is the case with the two Orders discussed in the foregoing note. As planning permission under Part III of the Act is not required in the case of this " permitted development ", it will not attach any liability to payment of development charge : section 69 (2) of the Act. This permitted development may, however, be restricted by directions made by the local planning authority and approved by the Minister under Article 4 of the present Order, either generally over a specified area or by the exclusion of particular types of development.

Permitted development under this Order will include most forms of development by statutory undertakers and local authorities, most trivial alterations within the curtilage of a dwelling-house (but not the construction of another dwelling or a garage), the restoration, etc., of war damage (but not where the external appearance is materially altered or the cubic content of the building increased) and certain agricultural " buildings, works and uses ". The temporary use of vacant land for a period not exceeding twenty-eight days will also rank as permitted development.

(b) Clauses providing for the method by which applications for planning permission must be submitted, and by which and the times within which the decision of the planning authority must be notified to the applicant. No actual form of application has yet been prescribed (but the Minister has promised that such will be issued before the appointed day), but application must be made to the local county district or county borough council, in manner detailed in the Town and Country Planning (Making of Applications) Regulations, 1948 (SI 1948, No. 711). The present Order provides that the decision of the planning authority must be notified to the applicant within two months, or in a case of development affecting trunk roads, three months, and in certain cases of development by mineral undertakers, eighteen months.

The Order also prescribes the form of acknowledgment that must be sent to an applicant, and three paragraphs that must be endorsed on notices of the decision of the planning authority, where permission is refused or granted subject to conditions.

(c) Miscellaneous clauses dealing with specific points of administrative machinery. Thus the Minister may give directions restricting the grant of permission by a local planning authority for a specified period, or on the other hand authorising an authority to grant permission for development not in accordance with the development plan. Appeals to the Minister against the decision of the local planning authority must be made within one month of receipt of the notice of the decision (subject to certain exceptional cases), a copy of the notice of appeal must be sent to the local planning authority, and the Order also prescribes the papers that must be sent to the Minister with such notice. Article 12 of the Order prescribes the type of register to be maintained by the local planning authority under section 14 (5) of the Act.

J. F. G.

OPTIONS OF PURCHASE AND PERPETUITIES

By E. O. Walford, LL.D., Solicitor

For a considerable period following the decision in *L. & S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562, it was assumed by most textbook writers that an option of purchase of a freehold or leasehold estate, whether granted to a stranger or to a lessee, was absolutely void if the period within which the option *might* be exercised was in excess of that permitted by the perpetuity rule. Whilst that may still be the true view it is not the position as the case law now stands. In *Hutton* v. *Watling*, [1947] 2 All E. R. 641, it was held that an option to purchase land without any time limit is specifically enforceable as a matter of personal contract against the original grantor of the option (as distinct from a successor in title of the grantor).

Degrees of Voidness

When a layman says "void", the chances are that he means void. When a statute says "void" or "utterly void" it is quite possible that it means "voidable" or something else. It might be thought that a bill which was declared by statute to be "utterly void, frustrate, and of none effect to all interests and purposes whatsoever" was of little use to anyone; but in *Edwards* v. *Dick*, 4 B. & Ald. 212, such a bill was held to be valid in the hands of an indorsee for value. Moreover, turning to the field of property law it has been held in relation to a statutory provision that leases not made in conformity with the statute (13 Eliz. c. 10) "shall be utterly void and of none effect, to all intents, constructions and purposes" are good during the life of the lessor, and not even void as against his successor, but merely voidable by him. Numerous other examples of a similarly restrictive interpretation of

the word "void" can be found under that word in *Stroud's Judicial Dictionary*.

Perhaps practitioners ought, therefore, to inquire, "How void is a limitation which is void as infringing the rule against perpetuities?" Before the decision of Warrington, J., in *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, it is probable that most conveyancers would have replied that such a limitation or a contract to create such a limitation was a nullity. However, in the last mentioned case the curate's egg construction was applied to an option of purchase. It was held that although an option of purchase which infringed the perpetuity rule could not be specifically enforced, damages could be recovered by the option holder against the estate of the grantor who had died meanwhile. Warrington, J., indicated that he was sitting to administer the common law, and that the contract was not unlawful. Hence, he concluded that damages could be awarded against the contracting party or his estate notwithstanding the fact that specific performance could not be decreed against an assignee of the reversion, the option being exercisable within a period exceeding that permitted by the perpetuity rule. The doubt which that decision created was whether it could properly be said that a covenant or contract treated by the law as void on grounds of public policy could properly be said to be lawful. It may be that a covenant by A with B to pay a certain sum to B if an option which A is purporting to grant to B is void as a perpetuity is a perfectly valid covenant, but that is a different thing from holding that damages can be awarded for breach of a covenant which is void on grounds of public policy. In the case of *Collins* v. *Plummer*, 2 Vern. 635, which was cited by Warrington, J., in the *Worthing Corporation Case*, *supra*, there was a covenant by A not to suffer a common recovery, which he did, contrary to the covenant. Warrington, J., appears to have thought that the fact that the covenantee was able to recover damages supported his view as above stated. It is, however, submitted that no more is to be got from that case than can be found in the words of the Lord Chancellor, who said: "You knew he had right to bar, and therefore agree to accept of *a covenant by which to have damages* and not the thing in specie: that would be to make it beyond the agreement". We shall, however, refer to the question of public policy more fully at a later stage.

Identification of Beneficiary

In relation to the requirement of vesting within the perpetuity period it is elementary law that the test is not whether someone does in fact become entitled to a vested interest within the permitted period. The test is whether the interest must necessarily vest within that period. It may be urged that if A gives to B an option of purchase B has a present right, and that if he assigns that right the assignee also has a present right. No doubt B's interest is vested in that sense, but neither B nor his assignee has more than a contingent equitable interest in the land which is the subject of the option. Possibly the clearest statement of the requirement of the rule against perpetuities concerning the identification within due time of the person or persons who are to take the contemplated interest is that of Fry, J., in *Blight* v. *Hartnoll* (1881), 19 Ch. D., at pp. 300, 301. "The rule against perpetuities

requires, in my view, the ascertainment within the period, not only of the extreme limits of the class of persons who may take, but of the *very persons* who are to take, and that because the rule is aimed at the practical object of telling who can deal with the property and if you cannot tell who are entitled to the property but only who may become entitled to the property, the property is practically tied up."

In the case of an option which is not personal to the grantee and is expressed to be exercisable at any time it is clear that the option would, if valid, constitute a " tying up " of the property in the sense indicated by Fry, J. As will be seen from the decisions mentioned later there is authority on this point.

PUBLIC POLICY

Lord Nottingham, in the *Duke of Norfolk's Case* (1681), 2 Swanst. at p. 460, speaking of the older perpetuities created by way of remainder, said, " Such perpetuities fight against God by affecting a stability which human providence can never attain to, and are utterly against the reason and policy of the law ".

There may be cited also the words of Littleton (§ 360): " If a feoffment be made upon this condition that the feoffee shall not alien the land to any this condition is void . . . for if such condition should be good then the condition should be against reason and therefore such a condition is void ". That passage does not mean that partial restraints were invalid.

Where public policy conflicts with a contract the principle of " sanctity of contract " has no scope for operation. " The interests of contracting parties are not necessarily the same as the interests of the Commonwealth ": *Maxim Nordenfelt Co.* v. *Nordenfelt*, [1893] Ch. at p. 661. The view expressed by Lord Nottingham is not, of course, conclusive of the question whether A can enforce against B an option to purchase land if that option is expressed to be exercisable during a period in excess of that permitted by the perpetuity rule. The authorities in support of that view will be cited in the final part of this article. Meanwhile two other decisions may be mentioned as bearing on the question of public policy. In *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, Farwell, J., said: " In an agreement *inter partes* between these two companies clause 3 (giving a right of pre-emption) would clearly be void for perpetuity because there is no limit in point of time "; but he added that the question of perpetuity was disposed of by the statute, " Parliament having declared an agreement valid it is valid *in toto* ".

In *Edwards* v. *Edwards*, [1909] A. C. 275, a testator directed his sons and their heirs to make certain payments to his daughters out of royalties or dead rent payable out of the coal when worked or let. The mine was not then being worked. Lord Macnaghten said that the intention of the testator was to create executory limitations in land to arise at some future and indefinite period on a contingency, and to enforce on the land a fetter or burthen of indefinite duration which could not be got rid of without the consent of the persons taking the executory interests which were, therefore, void for remoteness. And so the poor daughters had none.

It seems strange if options or other executory limitations created

by will are nugatory on grounds of public policy when infringing the rule against perpetuities but valid and enforceable *inter partes* when arising by contract. It is clear from *L. & S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562, that Jessel, M.R., was of opinion that if the rule as to remoteness applied to a covenant giving an option of purchase that covenant was clearly *bad* as extending beyond the period of the rule. He further held that the option conferred an interest in land, and that the rule against perpetuities did apply, stating that there was no distinction between one kind of equitable interest and another. He also said, "In my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift *or contract* can make no difference" as regards the rule of remoteness. There is nothing in the judgments in *L. & S. W. Ry.* v. *Gomm* of Jessel, M.R., or the other members of the Court which countenances the view that an option infringing the perpetuity rule could be enforced *inter partes*, though reference will be made in a later part of this article to *dicta* of Cozens-Hardy, L.J., which show that in his opinion such an option could have been enforced against the grantor personally by the grantee of the option. Also, it must be conceded that if those *dicta* could be regarded as well founded, they would justify the view that an option, though not effectual to create an equitable interest, is nevertheless enforceable *inter partes*. The further consideration of that point must be deferred; but before leaving the subject of public policy it is necessary to refer to the remarks of Sir Frederick Pollock concerning the decision in *Worthing Corporation* v. *Heather*, *supra*. It will be remembered that in that case Warrington, J., held that damages could be recovered by the option holder from the grantor of the option or his estate even though the option period infringed the perpetuity rule. Sir Frederick Pollock in his work on *Contracts* (10th ed.) at p. 355, footnote (*k*), stated that:

> "A contract to convey land on a contingency not necessarily within the limits of the rule against perpetuities is not invalid, for the rule has nothing to do with merely personal contracts; but it will not be specifically enforced, for it cannot be recognised as creating any equitable interest, *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532; 75 L. J. Ch. 761. This curious but correct result follows from the strict application of positive rules and does not depend on any doctrine of policy".

Taken literally that statement would appear to suggest, and may be intended to suggest that even as between the grantor and grantee of the option the fact that no equitable interest was created would be sufficient to prevent the Court from decreeing specific performance. If so the statement may be adopted in support of the argument that *Hutton* v. *Watling*, *supra*, was wrongly decided. However, although it seems difficult, if not impossible, to find any example of a valid contract to grant an interest in land which does not create an equitable interest in that land (*a*), it may be conceded that as between the actual parties to a contract the remedy of specific performance may be available although the subject-matter does not constitute a recognised interest in land. Even if that concession is made it remains

(*a*) See ss. 1 and 2 of the Law of Property Act, 1925, and the Land Charges Act, 1925, as to registration of estate contracts.

the fact that in the case of an option of purchase of land the subject-matter is necessarily an interest in land.

Pollock's meaning when referring to the fact that "the rule has nothing to do with purely personal contracts" is not clear; but reading it with his statement that the contract does not create any equitable interest (as it would do if confined within the perpetuity period), the guess may be hazarded that his meaning was as follows. The option confers merely a contractual and not a proprietary right: the perpetuity rule has therefore no application. However, that interpretation appears to ignore the fact that the sole reason why the contract does not create any proprietary right is that its terms infringe the rule against perpetuities: it is not of the nature of a purely personal contract but would in fact create an equitable interest if the policy of the law so permitted. The fact that it is unenforceable may therefore be said (contrary to the view expressed by Pollock), to depend on a doctrine of policy, namely, the perpetuity rule. Whilst Pollock states that the contract in such a case "is not invalid" but will not be specifically enforced, he does not state in what way the validity of the contract can be recognised by the law. We know, of course, that Warrington, J., in the *Worthing Corporation Case*, held that although the contract could not be specifically enforced by an assignee damages could be recovered against the estate of the original contractor, but it is not clear on what ground that ruling can be justified. As Pollock himself says (*ibid.* p. 412): "When the immediate object of an agreement is unlawful the agreement is void. . . . We mean it [*i.e.*, that proposition] to cover only those cases where either the agreement could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, *but on grounds of public policy is not allowed to be made a matter of contract*".

That observation appears to be applicable to an option which infringes the perpetuity rule. Clearly the conveyance by the grantor of the option land would be lawful enough even if effected at a period subsequent to that permitted, in the circumstances, by the perpetuity rule; but on grounds of public policy a contract by the grantor to effect a conveyance at so remote a date is not allowed to be made. The possible view that the obligations imposed by such an agreement may be treated as severable is mentioned later and is rejected (*b*). In any event it does not seem that the doctrine of severability would account for the observations of Pollock on the award of damages in *Worthing Corporation* v. *Heather, supra.*

The Nature of an Option

As the question whether the rule against perpetuities applies to options of purchase depends upon the question whether the right of an option holder is a recognised interest in land, it is necessary to consider certain provisions of the Law of Property Act, 1925, and judicial decisions. If we find that the person entitled to the option has no mere contractual interest but an actual recognised interest in land, we have next to consider whether it is such an interest that the rule against perpetuities is satisfied. Thus, although it may be said in general

(*b*) See the remarks of Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm* referred to in the concluding portion of this article.

terms that an executory limitation creates a recognised interest in land, it does not follow that all executory limitations are good. Indeed, the rule against perpetuities is generally stated by reference to executory limitations, the rule being that such limitations in order to be valid must be such that they will necessarily vest within the permitted period of a life or lives and twenty-one years thereafter, or, alternatively, within twenty-one years.

Does an Option Create an Interest in Land?

It is no doubt true to say that an option operates contractually; but such a remark is equally true of a contract for the sale and purchase of land. It may not be strictly accurate to say that an option is a conditional contract for sale and purchase. It is, however, clear that the *ultimate* obligation which it imposes upon the vendor is precisely the same as that which it imposes on the vendor by a contract for sale and purchase, namely, to convey the land on the payment of the price. The difference is, of course, that until the option holder actually exercises the option the vendor cannot tell whether he will ever be obliged to convey the land. Here, again, it may be said that where there is an unqualified contract for sale the vendor is in a very similar position because he cannot be required to convey unless the price is paid and he cannot tell whether the price will be paid. The only practical difference is the necessity of notice in the case of the option. Fundamentally an option is a contract for the sale of the land if and when the option holder gives notice calling upon the vendor to proceed to completion of the sale. The vendor is bound as firmly to sell in the case of an option as in the case of a contract for sale. It is indeed the purchaser who is free. He alone can decide whether to exact performance of the vendor's obligation. If the option is exercisable only by the option holder, an individual, during his life the question of a perpetuity cannot arise. If, however, the option is exercisable by the option holder his personal representatives or assigns the position is at once altered, though the result remains to be considered. In this section it is necessary to pursue the inquiry whether an option creates an interest in land. The provisions of the Law of Property Act, 1925, are germane to that inquiry, but certain other statutory provisions and judicial decisions are also material. It is convenient to deal with those provisions and decisions in separate paragraphs.

(a) *Law of Property Act*, 1925.

An examination of sections 1 and 2 of the L. P. A. 1925, will show, as might be expected, that an option cannot constitute a legal estate in land (*c*).

An option of purchase is, however, an equitable interest within the meaning of the L. P. A. 1925. Section 2 of that Act which deals with conveyances overreaching equitable interests and powers specifies certain " equitable interests and powers " which cannot be overreached

(*c*) The meaning of the words " right or privilege in or over land for an estate in fee simple absolute in possession or a term of years absolute " in s. 1 (2) (a) is shrouded in mystery; but it is thought to be sufficiently clear that they do not extend to an option. It is clear that an option could not be said to exist for an estate in fee simple or a term of years absolute (a pre-requisite of a legal estate).

under section 2 (2), namely (*inter alia*) " a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption, or any other like right ". The phrase " *valid* option " is not without significance in relation to the question under consideration in this article. Such an option if granted after 1925 is, of course, registrable as a land charge under the Land Charges Act, 1925, and if not so registered is void against a subsequent purchaser, even with notice; but this point is not material to the present inquiry (*d*).

By section 186 of the L. P. A. 1925, it is declared that " all statutory and other rights of pre-emption shall be and be deemed always to have been capable of release, and unless released shall remain in force *as equitable interests* only ". It is not altogether clear whether that provision is intended to extend to options of purchase, but if it does the section clearly reinforces the view that an option of purchase creates an equitable interest in land within the meaning of the L. P. A., 1925. It does not necessarily follow that it is an equitable interest for all purposes. Legal easements are " land " for the purposes of the L. P. A., 1925, but they are nevertheless incorporeal hereditaments, and are not land for all purposes.

(b) *Judicial decisions.*

It will be necessary to refer to the pre-1926 decisions in due course; but first it is desired to consider what view has been taken by the Courts since the 1925 legislation of the nature of the interest created by an option of purchase.

(i) That question arose for consideration in *Oppenheimer* v. *Minister of Transport*, [1941] 3 All E. R. 485, where A held an option of purchase, and a notice to treat for the compulsory acquisition of certain land not comprised in the option was served by the Minister of Transport. The land last mentioned was adjacent to the land comprised in A's option and the question was whether A could claim in respect of injurious affection of the option land. Caldecote, C.J., cited *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562 as authority for the view that an option of purchase created " an interest in the land ", and referred to A's interest as " an equitable interest or equitable estate ". Asquith, J., concurred in that view (*e*).

(ii) In *Skelton* v. *Younghouse*, [1942] 1 All E. R. 650 (H. L.), a very different question arose for consideration, but the dicta concerning the effect of an option of purchase given by a will are of interest. It was laid down that the statement in *Jarman on Wills*, 7th ed., Vol. 1,

(*d*) In the case of options granted before 1926 see L. P. A., 1925, s. 2 (5) and L. C. A., 1925, s. 14 (2) as to land charge registration.

(*e*) The editorial headnote to the All England Report of *Oppenheimer* v. *Minister of Transport*, *supra*, appears to suggest that *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562, upon which Caldecote, L.C.J., relied was quite or almost completely irrelevant. A perusal of the report of the last mentioned case will show that such a suggestion is untenable. The same headnote concludes with the proposition that the fact that a right can be specifically enforced against a purchaser for value with notice but not against such a purchaser without notice is a characteristic of an equitable interest and appears " to show that the right here in question was an equitable interest in land and a proper matter for compensation ". It seems very difficult to understand that proposition. It is either an argument in a circle or involves a *non sequitur*. It is a characteristic of water that it is wet, and the same may be said of brandy. It does not follow that they are the same thing

p. 73, that " An option of purchase given by will to A. B. is *prima facie* personal to him, and does not pass to his executors on his death " was incorrect, and that there was in fact no presumption either way, the position being that the intention of the testator is to be gleaned in every case from the words of the will and any surrounding circumstances which may be admissible as evidence. Viscount Maugham referred to the following dictum of Lord Dunedin in *Wright* v. *Morgan*, [1926] A. C. 788, at pp. 795, 796 : " The leading question is whether the option to purchase . . . was assignable . . . Speaking generally any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of the assignability ".

Commenting on that passage Viscount Maugham said that it was to be noted that the right given in the present case was not a vested interest in the ordinary sense, and proceeded " without saying anything on the question whether an option to purchase contained in a will confers a vested interest before the option is exercised, and particularly if the option is only exercisable at an uncertain time, I may observe that the observation was of the nature of an *obiter dictum* and the point was never in fact argued before the Board ", adding that *Re Cousins* (1885), 30 Ch. D. 203 and other relevant decisions on this point were not cited or considered.

It was not necessary to pursue that point in the instant case; but the observations of Viscount Maugham constitute a reminder that if an option of purchase confers an equitable interest in land it does not follow that such interest is necessarily a vested interest. The importance of that point in connection with the present inquiry is that although the rule against perpetuities requires only that limitations should vest in interest and not necessarily in actual enjoyment within the perpetuity period, it is not enough to conclude, as we may hereafter conclude, that an option of purchase creates an equitable interest. It will still be material to consider whether an option confers an equitable estate vested in interest. Thus, if after a life interest there is an absolute gift to a class and the whole of the class must necessarily be determined within the perpetuity period, the fact that the actual enjoyment of the gift may be postponed during the lifetime of the lifetenant does not render the gift to the class bad, even though the life interest is given to a person who may not be born at the date of the settlement : *Re Garnham*, [1916] 2 Ch. 413. If for " absolute gift to a class " we substitute " option of purchase " the proposition at once becomes doubtful, unless we are of opinion that an option of purchase exercisable immediately constitutes an equitable estate so vested in interest as to be immune from the perpetuity rule. The judicial dicta in this connection afford no support for such an opinion. If an option of purchase is to be regarded as a contingent limitation the words of Farwell, J., in *Re Ashforth*, [1905] 1 Ch. 546, are material. " The rule against perpetuities applies to all contingent equitable limitations of real estate and all contingent limitations of personalty, including leaseholds." In *L. & S. W. Ry.* v. *Gomm*, *supra*, Lindley, L.J., speaking of the option of purchase then under consideration, said, " I agree with the observations made by the other members of the Court, that this covenant creates an interest in land ",

but note the words which follow, " *and is void for remoteness* ". It is obvious that he could not have regarded the interest to be so vested as to be immune from the rule against perpetuities.

(iii) The decision of Astbury, J., in *Re Flint*, [1927] 1 Ch. 570, left practitioners in doubt as to the true effect of an option of purchase given by will. His Lordship considered that such an option would be effective if the trustees were selling under a trust or power in the will itself, but not, as in the instant case, where the sale was effected under the statutory trust for sale. He did not consider that the option holder had a *paramount* equitable interest within section 3 of the Law of Property Act, 1925. As to section 35 of that Act he thought that it was difficult to see how the direction in that section to give effect to the rights of persons interested in the land could apply to rights of pre-emption. His Lordship did not, however, hold that such an option was not an equitable interest as defined by section 205 (1) (ix) of the Law of Property Act, 1925.

It is certainly fortunate that further light has been shed on the effect of such an option by the later decision of Cohen, J., in *Re Armstrong*, [1943] 2 All E. R. 537. There certain land was given by a testator to his wife for life with an option for his son Harold to purchase it within one year after her death for £5,000. Cohen, J., said that in *Re Flint* the son had no right to buy at a fixed price and the son's rights (if any) in the proceeds of sale were not considered. Later, he observed that " Harold's right to purchase is, I think, in accordance with the decision in *L. & S. W. Ry.* v. *Gomm*, (1882), 20 Ch. D. 562, an interest in land ". He further solved the problem of the conflict between the overriding right of the tenant for life to sell in exercise of her power of sale under the Settled Land Act, 1925, and the option of the son Harold to purchase at the specified price. That problem was resolved by reference to a much older case where a similar problem had arisen. Effect was to be given to the option by treating the capital moneys and investments arising from any sale by the tenant for life as subject to the option. Harold was therefore entitled, upon exercising the option within the period specified in the will, to purchase the proceeds of sale or the investments representing the same at the price of £5,000. With respect, it is submitted that Mr. Justice Cohen's decision was not merely an eminently practical one, but was also entirely in conformity with the spirit of the 1925 legislation which was intended to simplify conveyancing, and not to destroy beneficial interests where they were capable of preservation without doing violence to the over-riding powers established by the new Acts. In the instant case it was impracticable to hold that the overriding statutory powers of the tenant for life were not exercisable in face of the express provisions of the Settled Land Act, 1925, but there was nothing to prevent the son from receiving the difference between the option price and the actual sale price, and thus benefiting so far as it was possible to give effect to the intention of the testator. For our present purpose it is sufficient to note that Cohen, J., considered that the option of purchase constituted an interest in land. It is submitted that the decisions above mentioned show that the Acts of 1925 have not been regarded by the Courts as reducing options of purchase to the status of mere personal contracts if they were properly described as interests in land before 1926.

Specific Enforcement of Void Options?

We may now suitably consider the decisions which were referred to by Jenkins, J., in *Hutton* v. *Watling, supra.* It is hardly necessary to refer in detail to the facts or judgments in the leading cases, as these are readily accessible from the reports. It must suffice to follow Mr. Justice Jenkins, so far as we can, in his analysis of the relevant decisions. It may perhaps be suitable, before considering where we part company, to indicate the extent to which we can walk hand in hand :

(a) An option of purchase creates an interest in land and is subject to the rule against perpetuities.

(b) In *Worthing Corporation* v. *Heather, supra,* Warrington, J., held that while the rule against perpetuities was a fatal objection to an action for specific performance *against the successors in title* of the original grantor of an option damages were recoverable, at law against the original grantor's estate for breach of covenant, as there was nothing unlawful in the contract as such.

Agreement is expressed with the above statement of the effect and *ratio decidendi* of *Worthing Corporation* v. *Heather,* but doubt is expressed regarding the correctness of the decision : see the section of this article headed Public Policy, *supra.*

(c) The jurisdiction to grant specific performance of a contract for the sale of land is founded not on the equitable interest in the land which the contract is regarded as conferring on the purchaser, but on the simple ground that damages will not afford an adequate remedy.

(d) Cozens-Hardy, L.J., in *South Eastern Ry.* v. *Associated Portland Cement Manufacturers, Ltd.,* [1910] 1 Ch. 12, considered that if the original covenantor in *L. & S. W. Ry.* v. *Gomm* had been sued on his covenant (which infringed the rule against perpetuities), that covenant would have been enforceable " and the whole doctrine of the rule against perpetuities would have had nothing to do with it ". It is proposed to refer to the last mentioned decision as " the *Portland Cement Case* ". At this stage it is necessary only to say that the agreement here expressed is limited to the fact that Cozens-Hardy, L.J. (and no other member of the Court) enunciated the view last mentioned, and that his remarks may, it is submitted, be treated as *obiter,* because the *Portland Cement Case* can be treated as good law on other sufficient grounds to which the other members of the Court referred.

Those are the main points upon which agreement with the views of Mr. Justice Jenkins in the case of *Hutton* v. *Watling, supra* can be expressed here. His Lordship considered that the decision in the *Portland Cement Case* was an authority which compelled him to hold that an option granted by A to B was specifically enforceable by B against A as a personal contract. The *Portland Cement Case* was one in which the plaintiffs had granted to the defendants the easement or right to make a tunnel through the plaintiffs' land at a point to be

selected by the defendants. As Swinfen Eady, J., pointed out there was no question of the grant of an easement *in futuro*. There was, as he remarked, an immediate right to make the tunnel. Either the grant operated as an immediate easement, which may be doubtful having regard to the nature of the right purported to be granted or it was a mere licence to which the perpetuity rule could have no application. As Fletcher Moulton, L.J., said: "The company made a personal agreement that they would allow something to be done. They are bound by that agreement because, as the Master of the Rolls said, personal covenants do not fall within any rule of perpetuities, and they are the actual covenantors". Farwell, L.J., said in effect:—

(1) An agreement merely personal not creating any interest in land is not within the rule against perpetuities.

As an option of purchase does create an interest in land that remark is not germane to the point here under consideration.

(2) A contract may be connected with land, but that does not make a personal contract any less binding on him, "unless the Court can by construction turn it into a limitation of land, and a limitation of land only."

It is submitted that an option of purchase of land is a limitation of land and that the observation above mentioned of Jessel, M.R., in *L. & S. W. Ry.* v. *Gomm* that it makes no difference whether the option is created by devise or voluntary gift or contract.

(3) As regards the original covenantor it may be both a personal covenant and an attempted limitation of land which may be bad for perpetuity. As to the personal covenant it may be binding on him because the rule against perpetuities has no application to such a covenant.

The comment upon that passage is not that agreements of a type which the Courts regard as contrary to public policy can be enforced *inter partes* though they are not enforceable against the assigns of the covenantor. Taken in conjunction with the subject-matter of the action the simpler explanation is that the right granted in the *Portland Case*, though probably not effective as an easement, might nevertheless be quite valid as against the grantor by way of licence to which the rule against perpetuities would have no application, though (not being an interest in land or a covenant running against the land) it would not be binding on the assigns of the grantor. A clear case in which an attempt to create a recognised interest in land may fail, but may operate as a bare personal covenant is that in which a purported grant of an easement fails for want of a dominant tenement. "A right which would be an easement if it were enjoyed in respect of a dominant tenement, is, if there be no such tenement to which it can be appurtenant, a right which, unless it is coupled with an interest in the land over which it is enjoyed, is no more than a mere licence", *Hood & Challis's Property Acts*, 8th ed., p. 74. It is well established that such a licence is perfectly lawful; but the point is that it operates merely by way of personal contract and is not interpreted (*as an option of purchase is interpreted*) as an interest in land binding on the assigns of the grantor. It is quite possible that the right to make a tunnel, as granted in the *Portland Cement Case*, was no more than a licence, for there was no

adjoining or neighbouring land to which it was annexed (*f*), and a right to erect a structure upon or dig in another man's land is certainly not a well recognised easement.

(4) The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land.

If that statement is divorced from the statement which immediately preceded it (see (3) above), then it is of course possible to interpret it as a proposition that the perpetuity rule does not apply to options so long as the person granting the option still has the land and the person seeking to enforce it is the person to whom it was granted. On the other hand if the statement is read with the remarks which preceded it, no such interpretation is necessary. The statement may mean simply that if purely personal rights are granted (*e.g.*, by way of licence operating contractually as distinct from a disposition operating by way of equitable interest and amounting to a limitation infringing the perpetuity rule), those personal rights do not hold up the land because they are not of such a nature that they can be enforced against assignors. That does not mean that a limitation infringing the perpetuity rule is enforceable between the parties. If it were so why should it not be good *pro tanto* in a settlement? In that connection the earlier words of the learned Judge are significant: "An agreement merely personal *not creating any interest in land* is not within the rule against perpetuities". It is submitted that it is no answer to the words italicised above to say that an option for a period exceeding that permitted by the perpetuity rule does not create an interest in land, and that therefore it is a good option *inter partes*. Purported grants of equitable interests which *may* not vest within a *specified* life or lives and twenty-one years thereafter or within a period of twenty-one years in gross are entirely and not partially void.

As Fletcher Moulton, L.J., said: "The company made a personal agreement that they *would allow something to be done.* They are bound by that agreement because, as the Master of the Rolls said, personal covenants do not fall within any rule of perpetuities, and they are the actual covenantors". It can hardly be supposed that in saying that "personal covenants do not fall within any rule of perpetuities", he was stating that options of purchase were purely personal covenants and not subject to the perpetuity rule.

There remain the observations of Cozens-Hardy, M.R., concerning the case of *L. & S. W. Ry.* v. *Gomm.* It is certainly difficult to understand his opinion that the L. & S. W. Ry. could have enforced the option of purchase against Powell the original covenantor. It can, however, be said that his Lordship's deduction from the observations of the members of the Court at *L. & S. W. Ry.* v. *Gomm* do not appear to be justifiable. His deduction from the remarks of Jessel, M.R., are plainly unsupportable. It is true that Sir George Jessel said, "If it is a bare or mere personal contract it is, of course, not obnoxious to the rule"; but he held that it was not a mere personal contract. Kay, J., had observed that a contract to buy or sell land was not void

(*f*) It may perhaps be thought that the ingenious doctrine enunciated in *Re Salvins Indenture*, [1938] 2 All E. R. 498, would assist in the provision of the necessary dominant tenement.

for perpetuity : " They are not ", he said, " properly speaking interests in land *and are therefore not within the rule* "; and he declared that the covenant did not " create any interest in land ". Jessel, M.R., expressly repudiated that view and declared that it did create an interest in the land (*g*). It is plain that Jessel, M.R., did not regard the option in *L. & S. W. Ry.* v. *Gomm* as one which was enforceable between the parties as will be seen from the following extracts from his judgment. Having read the covenant giving the option of repurchase to the company, Jessel, M.R., said :

> " Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words ' within a reasonable time ' *or any other words limiting the time*, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time but it is obviously intended so to be. . . . The very essence of the contract is that it shall be indefinite in point of time. You cannot as in *Kemp* v. *South Eastern Ry.*, L. R. 7 Ch. 364, insert by intendment the limitation that the land is to be taken before the time for executing the works had expired, for in this case the time for executing the works had already expired. . . . If then the rule of remoteness applies to a covenant of this nature, this covenant *is clearly bad* as extending beyond the period allowed by the rule ".

Jessel, M.R., then said that whether the rule applies depends on whether the covenant creates an interest in land, " If it is a bare or mere personal contract it is, of course, not obnoxious to the rule ; but in that case the appellant (the assignee of the grantor of the option) could not be bound ". Later he said, " The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature ", and that " the covenant giving the option must give that other [the grantee] an interest in the land ". Later he observed :

> " It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift *or contract* can make no difference. The question is what is the nature of *the interest intended* to be created [the italics are mine]. . . . Now, is there any difference between a contract for purchase, or an option of purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B or his heirs to A or his heirs, and a contract that whenever such notice is given and such payment made by B or his heirs to A or his heirs A shall convey to B and his heirs. It seems to me that in a Court of Equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me

(*g*) The point was not taken in the judgments of the members of the Court of Appeal in *L. & S. W. Ry.* v. *Gomm* that the option could only be treated as *purporting* to create an interest contrary to the perpetuity rule, though Jessel, M.R., said that the question was " What is the nature of the interest *intended* to be created? "

to be plain that the rules as to remoteness apply to one case as much as the other ".

If Jessel, M.R., thought that the covenant was " bad " only in the sense that it was not enforceable against an assignee of the land it will, I think, be agreed that he used strange language to express that thought. His language, in the passages above mentioned, is addressed to the demonstration of the view that an option of purchase, although in form a contract, is in fact an interest in land, and that if a person purports by covenant to grant an option for a period exceeding that permitted by the permitted rule such covenant is bad in law. For these reasons it is submitted that any *obiter dicta* of Cozens-Hardy, L.J., and Farwell, L.J., in the Court of Appeal in the *Portland Case, supra*, to the effect that the Court in *L. & S. W. Ry.* v. *Gomm* would have held the original grantor bound, if living, were based upon an insufficient consideration of that decision. Lindley, L.J., said in the last mentioned case that he agreed that " this covenant creates an interest in land and is void for remoteness ". Sir James Hannen said : " I think that if there had been a separate contract limited to the time within which the company would have authority to take lands, there would have been nothing *illegal* in their entering into an arrangement with the owner that they should have a right to purchase at a particular price ". It is clear that he was considering the position *inter partes*, and it would seem that he considered that the actual contract *was* illegal.

Illegality

In *Hutton* v. *Watling, supra*, Mr. Justice Jenkins refused to follow *Rider* v. *Ford*, [1923] 1 Ch. 541, because in that case Russell, J., accepted the view of counsel that even between the parties an option bad as infringing the rule against perpetuities could not be specifically enforced. It is, however, unfortunate that the case of *Trevelyan* v. *Trevelyan* (1886), 53 L. T. 853 was not mentioned by Mr. Justice Jenkins. There Bacon, V.-C., held that a covenant to reconvey which was void for perpetuity was " a covenant not binding at law " and that it was " against the well established law that any such covenant should be enforced ". Later he said :

> " This is not a lawful covenant : it is a covenant tending to a perpetuity, which the law does not allow, and which, therefore, cannot be enforced ".

I respectfully adopt those words, and in doing so I venture the opinion that the decision of Warrington, J., in *Worthing Corporation* v. *Heather, supra*, that damages were recoverable in respect of the breach of a covenant void for perpetuity was incorrect. He based his judgment upon the view that such a covenant was not illegal. In my submission options of purchase which operate as (purported) limitations of land contrary to the perpetuity rule are not " curate's egg " covenants but are void for all purposes and cannot be vicariously enforced, if the pun may be permitted.

The Present Law

Having described the egg which was produced in *Worthing Corporation* v. *Heather* as a curate's egg, I think that the law as it

must now be stated since the decision *Hutton* v. *Watling* may be fairly described as addled. It is emphasised that the statements which follow are intended to represent the law as it now stands if *Hutton* v. *Watling* was correctly decided, and not as representing the writer's own view: see the concluding words of the last preceding section headed "Illegality".

(1) *Corporations.*

Assuming that corporation A grants to corporation B the right during the period of, say thirty years, to purchase certain land for £1,000 that option is presumably specifically enforceable by B and its assigns (*h*) so long as A remains in existence and has not parted with the land.

(2) *Individuals.*

Next let us assume that A, an individual, grants to B, another individual, a similar option of purchase (not personal to B). The effect of the option may then be considered in relation to various possibilities.

(a) Both parties are living, and B exercises the option in, say, the twenty-ninth year. According to *Hutton's Case* the exercise of the option is valid. If A has disposed of the land B will be entitled to damages (to the extent of his loss).

(b) A dies one year after the grant of the option. B exercises the option, say, twenty-eight years later. If A's personal representatives still hold the land the option can be specifically enforced because the rule against perpetuities does not forbid the specific enforcement of an option for a period in excess of that permitted by the perpetuity rule. (I mentioned that the egg in *Hutton* v. *Watling* was addled.) The point is that an option which is exercisable only within the perpetuity period runs in equity with the land; but an option which is not so limited does not so run, but is a purely personal covenant and is, therefore, not affected by the perpetuity rule. If *Hutton* v. *Watling* was correctly decided, it will, of course, be necessary to say that the rule against perpetuities does not apply to options of purchase (*i*), but that if the option is for a period exceeding that permitted by the perpetuity rule it will not be binding on the assigns of the grantor because it will create only a personal covenant.

Still dealing with the case in which B exercises the option twenty-eight years after the death of A, if A's personal representatives have parted with the land B can recover damages from the estate of A if *Worthing Corporation* v. *Heather*, *supra*, was correctly decided.

(c) B's personal representatives or assigns exercise the option. The position is then as in (a) or (b) above according to whether A is still living or has died. It has already been demonstrated that an option is not normally confined to the lifetime of the grantor or grantee, and is not to be deemed to be personal to the grantee. Hence, there is no reason, if the *Hutton* decision stands, why B's assigns (even

(*h*) The question of assigns is dealt with later in this article.

(*i*) It is, of course, settled law that the perpetuity rule *does* apply to options of purchase.

though unborn at the date of the grant of the option) should not exercise the option regardless of the perpetuity rule.

(d) In the case posed above B cannot exercise the option against A's assigns because, according to all that is left of the rule concerning perpetuities in relation to options, an option which is exercisable during a period in excess of the period permitted by the perpetuity rule is not binding on the assigns of the grantor.

At present this article may fitly be concluded with the words *Hic jacet L. & S. W. Ry.* v. *Gomm.* To these words I would like to append the hope that it may be possible to write later, " *Sic transit Hutton* v. *Watling.*

STATUTORY CHARGES ON LAND

By E. H. Bodkin, Barrister-at-Law

The article published under the above title at page 45 of Vol. 12 of the *Conveyancer*, suggests some further interesting points. The possible inclusion of certain rights created, or authorised to be created, by recent statutes in the class of equitable easements registrable under the Land Charges Act merits consideration in detail.

" Equitable easements " have always been something of a mystery. They are defined as a charge or obligation affecting land of the following kinds, namely, " . . . any easement right or privilege over or affecting land created or arising after the commencement of this Act, and being merely an equitable interest (in this Act referred to as an ' equitable easement ')".

It has been generally considered that what are intended are rights capable of subsisting at law as easements and which only fall outside the category of legal easements by reason of not having been granted for an estate in fee simple or for a term of years absolute.

The recent case of *Lewisham Borough Council* v. *Maloney*, [1947] 2 All E. R. 36, however, suggests that this interpretation may be too narrow. In this case the defendants sought to extend the meaning so as to include the rights of an authority which had requisitioned the premises, but had, at the date of the sale, temporarily relinquished possession. Their argument was accepted by the County Court Judge, but the Court of Appeal reversed his decision, considering that though " rights " without a context would have a very wide meaning, in the particular context it must bear a restricted one. It did not *e.g.*, include a contract to create or convey a legal estate, which was registrable under another class as an estate contract. Further local land charges were expressly excluded from class B, but not from the class of equitable easements, and this led to the conclusion that this class did not include rights of that description.

It was argued on behalf of the plaintiffs that the words used were apt to cover only incorporeal rights or rights in the nature of incorporeal rights. The Court declined, however, to express an opinion on this general proposition, deciding the case on the ground

that it would be an unnatural extension of the meaning to construe the words as including the statutory rights of possession and user of the land conferred by requisitioning under Defence Regulation 51. The Court prefaced its judgment with the general observation that the object of the Land Charges Act, in conjunction with the other legislation of 1925, was to simplify the title to land, and these rights bore no obvious analogy to the kind of rights or interests which might apart from the Property Acts have burdened the title to land. They showed a greater resemblance to " charges " arising under town planning legislation, but these were separately treated under the Land Charges Act as local land charges.

Nevertheless, the Court expressed the opinion that where statutory rights were given which might reasonably be argued to be within Class D (iii) it was desirable for the statute to deal with the matter.

The case suggests that, though the word " rights " is to be limited by reference to the word " easements ", the class may include rights not ordinarily capable of subsisting as legal easements. The rights of a requisitioning authority under Defence Regulation 51 were summarised by the Court of Appeal as being to take possession of land and use it notwithstanding any restriction; to do, or authorise persons using the land, to do anything which a person having an interest in the land would be entitled to do by virtue of that interest; and by order to prohibit the exercising of rights of way and other rights. The Court of Appeal regarded these rights as probably not registrable at all because they were exercisable over all land, and the exercise of the right, and not the right itself, would have had to be registered. Further, the Defence Regulations contemplated obvious possession or user. But if the rights had been latent and exercisable in regard to particular land there appears to be nothing in the judgment inconsistent with their being regarded as registrable.

The right to requisition cannot attach to particular land until it is actually or notionally exercised, a notice of intention to exercise being of no effect in this respect. The recent abolition of the war-time power of summary requisitioning under the Defence Act has not affected the position in other cases.

The rights of an authority under a Town Planning Scheme on the other hand, to enter and pull down buildings, or to reinstate land used in contravention thereof, or to execute works in default of the owner, when they have became exercisable in relation to particular land and have, so to speak, crystallised, would appear to be in the nature of equitable rights of entry.

Such rights, when arising under a Town Planning Scheme, are, of course, protected by registration of the scheme itself. But similar rights, when not arising under a scheme and not required to be registered or protected as local land charges should, it seems, be registered as equitable easements as the only class which could include them. And the same, it is submitted, applies to an enforcement notice under the Town and Country Planning Act, 1947, which, when it comes into force, will supersede enforcement under planning schemes. Such rights would thus be void as against a purchaser if not registered as land charges, or, as regards registered land, if notice is not entered on the register. (See Land Registration Act, 1925, s. 71.)

A further example of rights of this nature not required to be registered as a local land charge is found in the right of entry to remove works under the Requisitioned Land and War Works Act, 1945, s. 29. This is exercisable only on notice, and when notice is given the right will attach to the land concerned. It differs in this respect from the original right to construct the works. Consequently it is arguable that it constitutes a separate right which if not immediately exercised is registrable as an equitable easement.

An easement or right restrictive of the user of land can be acquired by the Minister under section 37 of the Requisitioned Land and War Works Act, 1945, by deed poll if he considers it essential to the full enjoyment of land vested in him. The deed is to have the like effect as, and for the purpose of the Land Charges Act to be deemed to be, a deed of grant or covenant entered into with the Minister by all necessary parties. A restriction so created would be a restrictive covenant within Class D (ii). (A covenant to limit the growth of trees, which is deemed to be a restriction on user, is " for all purposes to be deemed a restrictive covenant ".)

A grant of a legal easement would not be registrable under the Land Charges Act; the section, however, apparently contemplates the acquisition of rights before the land to be benefited is vested in the Minister; he can acquire such rights for the benefit of land which " he has power to acquire ". An easement so created would be an easement in gross which could not be granted at law or in equity. The statute is apparently not intended to have the effect of authorising the creation of such a right at law contrary to the provisions of the Law of Property Act, 1925, and it is perhaps for this reason that a grant is made registrable as a land charge, *viz.*, as an equitable easement, which is the only possible class which would cover it.

Rights arising under a direction under the Civil Aviation Act, 1946, requiring demolition of buildings or cutting down of trees are also in the nature of equitable servitudes and resemble rights of prospect; but the direction itself should be registered as a local land charge.

It is arguable that the obligation of successive owners to permit anything reasonably necessary for carrying out works or maintenance under a hill-farming scheme under the Hill Farming Act, 1946, may be so registrable. A person having an interest in the land whose successors are bound by the obligation cannot be said by joining in submitting the scheme or consenting to its approval to have entered into covenants with the others so as to create a restrictive covenant within Class D (ii), but it may well be that an equitable servitude or restriction on user affecting the land is created analogous to a right to light. (Cf. *Re Nisbet & Pott's Contract,* [1906] 1 Ch. 386.)

The inchoate right of a development corporation under the New Towns Act, 1946, compulsorily to acquire adjacent land is not, of course, ever registrable as an option or easement, as no right arises over specific land until the order is made.

Certain rights which can be created in favour of the Minister by grant under the Civil Aviation Act, 1946, seem clearly to be equitable easements. These probably include easements *in futuro* which are otherwise unknown to the law.

Orders controlling the sinking of wells and the waste or excessive abstraction of water under the Water Act, 1945, appear to operate only *in personam* and to create no rights in the land.

The position may be different where the right is analogous to a profit *à prendre*, *e.g.*, the right to do works on or under land for the purpose of discovering minerals under the Atomic Energy Act, 1946. After the necessary notice to exercise it, this right might create a legal profit *à prendre*, a dominant tenement not being necessary for the creation of such a right at law. Anyhow such rights would be patent and not latent.

The extension of the meaning of equitable easements suggested above, does not seem to conflict with any other provisions of the 1925 legislation. The expression "easement right or privilege" in the Land Charges Act corresponds certainly with that used in relation to the easements capable of subsisting at law in section 1 (1) of the Law of Property Act, 1925, though in the latter "in or over land" is used instead of "over or affecting land".

It does not seem possible to found an argument upon this that "rights" in the former Act are confined to easements capable of being created at law. Though no new equitable rights can now be created by reason of the proviso to section 4 of the Law of Property Act, 1925, by grant, any rights or obligations may be created by Act of Parliament and be registrable if the language of the Land Charges Act is wide enough to cover them.

In other sections of the 1925 legislation different expressions are used. Thus, in regard to the overreaching provisions in section 2 of the Law of Property Act, an equitable easement not capable of being overreached is defined as an "easement, liberty or privilege, over or affecting land and being merely an equitable interest". But if any such rights as are considered above do not fall within this description they would be saved by sub-section (3) (v) which excepts an equitable interest generally when protected by registration. The interpretation sought to be put on "rights" would not therefore enlarge the overreaching powers, assuming they apply to statutory rights.

Doubts have been entertained by some conveyancers as to the effect of non-registration of land charges which are made registrable by statutes subsequent to the Land Charges Act. Such charges, when falling within any of the specified classes of land charge or local land charge would, of course, be void for non-registration as against a purchaser (as defined in the Act in regard to the particular class of land charge in question) without any express provision to this effect in the particular Act. Even if the charge is in favour of a local authority or Minister, it would not generally be good as against all the world and not liable to be avoided by failure to register, as the Court of Appeal thought rights of taking statutory possession under Defence Regulation 51 might be, in the *Lewisham Case*.

Thus, charges to secure loans by local authorities under the Essential Buildings and Plant (Repair of War Damage) Act, 1939, would clearly fall within the definition of local land charges in section 15 of the Land Charges Act as amended by the Law of Property (Amendment) Act, 1946, though registration is not mentioned in the Act itself.

The charge for works done under a drainage scheme in favour of a catchment board under the Agriculture (Miscellaneous War Provisions) (No. 1) Act, 1940, or in favour of a drainage board under the Agriculture (Miscellaneous Provisions) Act, 1941, is not by those Acts required to be registered. Nor is a charge in favour of the Minister, for expenses of management of land incurred by him or the War Agriculture Committee, or by the person in occupation under an agreement made by either the Minister or the Committee. But all these charges (except possibly in some cases, the last) would be within Class A or B. As regards charges for expenses of management, there is perhaps some doubt, as the money is not directly advanced by the Minister, in whose favour the charge is created. The point is of importance inasmuch as (as in most such charges) the Minister is given all the powers of a mortgagee by deed. In this connection the decision in *Payne* v. *Cardiff R. D. C.*, [1932] 1 K. B. 241, may be referred to. It was there held that where a statutory charge payable by instalments under the Private Street Works Act, 1892, which gives the mortgagee the statutory powers under the Conveyancing Act, 1881, is subsisting, the mortgagee can sell on default in payment of an instalment, though he can, it seems, only recover the instalments in arrear. Similarly, development charges under the Town and Country Planning Act, 1947, would, when charged on the interest of the applicant under section 71, fall within Class B. A forestry dedication covenant under the Forestry Act, 1946, would seem clearly to require registration as a restrictive covenant; the Commissioners are to have the same rights as though it had been entered into for the benefit of adjacent land.

Where the statute creating the charge contains express provisions as to registration, the position varies according to the wording; a number of different forms have been used in recent statutes.

If the Act incorporates or imports by reference all the provisions of the Land Charges Act, there can be no doubt that the charge will be avoided as against a purchaser if it is not duly registered. For example, the Liabilities Adjustment Act, 1944, though it enacts that protection orders appointing a receiver, or charging land or vesting it in a trustee may be registered in accordance with the Land Charges Act, goes on to provide that the latter Act is to have effect as if such orders were included in the class of writs and orders mentioned in section 6 thereof. The Law Society has accordingly expressed the opinion ((1945), 42 Law Society's Gazette) that search for these orders is now only necessary in the ordinary Land Charges Register, and not in the register kept by the Registrar of Deeds of Arrangement. Section 8 of the Building Materials and Housing Act, 1945, provides as to restrictions on the price of houses built under licence that section 15 of the Land Charges Act shall have effect as if such restrictions were local land charges acquired by the local authority in whose area the house is situate. The War Damage Act, 1943, s. 20, provides that the provisions of the Land Charges Act shall apply to notices by the War Damage Commissioners as to restrictions on development imposed as a condition of payment of compensation in regard to particular areas, as if they were local land charges, and a similar form of clause occurs in the Ancient Monuments Act, 1930. Section 2

of the Civil Defence Act, 1939, provides that section 15 of the Land Charges Act (which relates to registration of local land charges) shall apply, and the charge shall be registered by the proper officer. Section 8 (4) of the Agricultural (Miscellaneous Provisions) Act, 1941, enacts that a charge for the improvement of ways over fenland " shall be a local land charge " and shall be registrable under section 18 of the Land Charges Act. The Legislature evidently considered these charges would be void if not registered, as section 7 (3) of the Agricultural (Miscellaneous Provisions) Act, 1944, enacts that the amendments as to such charges contained therein shall not affect the operation of the Land Charges Act, which provides that certain charges shall be void as against a purchaser unless registered. In all the above cases all the provisions of the Land Charges Act seem clearly to be made applicable.

The Trunk Roads Act, 1946, provides that the provisions of the Land Charges Act as to the registration of local land charges shall apply as if the charges mentioned were local land charges. In any case the charges referred to, *viz.*, prescription of building and improvement lines and notices by highway authorities as to widening corners or restricting buildings, etc., thereat in relation to trunk roads, would (at any rate the two former) be local land charges.

Deeds poll by the Minister for acquiring an easement under the Requisitioned Land and War Works Act, 1945, other than a legal easement, are, it is submitted, registrable as equitable easements.

Yet another variation in the form of clause relating to registration, which seems now to be the favourite, is found in the Civil Aviation Act, 1946, Section 17 of the Town and Country Planning Act, 1944, which is incorporated in the New Towns Act, 1946, and in section 30 of the Town and Country Planning Act, 1947. This is that the charge shall be registered in the Register of Local Land Charges by the proper officer of the local authority where the land is situate, and in some cases that the person in whose favour it is shall give the necessary particulars. A similar form occurs in the Agriculture Act, 1947, in regard to registration of supervision orders. Here, however, a disposition in favour of a purchaser does not, unless approved by the Minister, affect the continued operation of the order, which in default of such approval continues in force as if made so as to relate to the new owner or occupier as well as the old. A purchaser would consequently appear to be bound under the express provisions of the Act even if the charge were not registered.

Orders and directions under the New Towns and Civil Aviation Acts do not appear to be local land charges apart from the provisions of those Acts, nor to be made so by them for all purposes. Consequently, non-registration as local land charges would not of itself avoid them, but a purchaser would only take subject to them if he had notice. But orders for the acquisition of equitable easements under the Civil Aviation Act, or directions thereunder, may be registrable as well under Class D (iii); it is therefore arguable that they would be void unless registered under one or other part of the Land Charges Act.

Inquiry is therefore desirable in these cases and should be made before contract in addition to search.

As regards the New Towns Act, search should normally disclose

whether the area has been designated as the site of a new town, and inspection of the plan will show its extent. It must be remembered that compulsory orders may be made by the development corporation for the purchase of adjacent land for purposes connected with the development of the new town, and of land, whether adjacent or not, for the provision of services.

Inquiry of the development corporation may elicit some information as to possible intended developments of the town or its services, but apart from this, the vendor will presumably be as much in the dark as the purchaser as to the extent or situation of land likely to be required.

Again, the Act may say that the charge *may* be registered as a land charge, *e.g.*, of Class A. This is so in the Civil Defence Act, 1939, in regard to a charge on the reversion created on the application of an outgoing tenant of a factory or commercial building holding under a short lease for the cost of air-raid shelters; and in the Landlord and Tenant Act, 1927, in regard to a charge created by order of the Minister on the land on the application of the landlord for compensation to the tenant for improvements. The word "may" can mean that registration can be omitted at the risk of the chargee, or may be a polite form of imperative. Fortunately these charges are both clearly land charges of Class A.

A further clue to the intention of the Legislature is furnished by section 15 (2) of the Water Act, 1945, which enacts that agreements by water undertakers as to the maintenance of works necessary for drainage or the collecting, conveying or preserving the purity of water *may* be registered under section 10 (1) of the Land Charges Act as obligations affecting the land within Class D, and unless void by reason of the failure so to register shall be binding upon and enforceable against successors in title.

There does not appear to be any discoverable reason for the bewildering variety of provisions in modern Acts as to registration. No common form has been adopted for all departments or local authorities or for private persons. The draftsman of recent Acts has, however, come more and more to assume that authorities and departments in whose favour charges are given, will not fail to give the required particulars to the local authority to enable them to keep the register up to date. But even Government departments are fallible, and it would be a great benefit if express provision were always made as to the effect of non-registration. This has been done, *e.g.*, in regard to charges under the Agricultural Credits Acts, and charges on plant under the Essential Buildings (Repair of War Damage) Act, 1939, though, of course, in these cases special provisions differing from those of the Land Charges Act were required.

The learned writer of the article referred to appears to suggest that search ought to be made before contract not only for local land charges, but also at the Land Registry against the names of former owners.

It is submitted that there can be no such obligation, and that a purchaser could not be held bound by an irremoveable incumbrance registered in the name of a person of whose existence he was not aware

by reason of the contract or otherwise, and against whose name he could not in fact search.

The case of *Re Forsey* v. *Hollebone's Contract*, [1927] 2 Ch. 579, related to a local land charge registered against the property, and though the judgment of Eve, J., was in terms wide enough to cover any land charge, the principle is certainly not one to be extended. The Court of Appeal expressed no opinion as to its correctness, and decided the case on other grounds. A purchaser has, apart from agreement, no means of discovering the names of prior owners, as the vendor is under no obligation to disclose them before the contract is signed. The purchaser could not in any case rely upon the vendor's accuracy or opinion as to what names should be included and a vendor would certainly refuse in most cases to deliver an abstract before the contract was signed. The Legislature can hardly have intended by section 198 of the Law of Property Act, 1925, notwithstanding the generality of its wording, to create a similar absurdity to that of *Patman* v. *Harland* which is remedied in the same Act. It must be admitted, however, that the absurdity has been perpetuated in the Land Registration Act in regard to leases, if the decision in *White* v. *Bijou Mansions, Ltd.* is correct.

RIGHTS OF SUPPORT

By J. F. GARNER, LL.M., Solicitor of the Supreme Court

It is proposed in this article to discuss the nature of the various rights of support known to English law, and to deal in particular with the effect thereon of the powers of public authorities, under such legislation as the Housing Act, 1936, and the Town and Country Planning Act, 1947.

THE NATURAL RIGHT OF SUPPORT

In *Gale on Easements* (11th ed. at p. 359), the following quotation is given from Rolle's *Abridgement* : " It seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie ", and this was explained by the remarks of Lord Tenterden in *Wyatt* v. *Henderson* ((1832), 3 B. & Ad. 871, at p. 876), " . . . if I have laid an additional weight upon my land, it does not follow that [my neighbour] is to be deprived of the right of digging his own ground because mine will then be incapable of supporting the artificial weight which I have laid upon it ", thereby making it clear that the natural right is confined to land unincumbered by buildings. There were various cases decided during the nineteenth century to the effect that, as a natural incident of his rights in the soil, the owner of a parcel of land is entitled to prevent, or to recover damages in respect of, the withdrawal of the lateral support of the adjoining owner's land by excavations or mining operations, so as to cause the falling in of the

surface of his own land (*a*), and the principle was confirmed by the House of Lords in the famous case of *Dalton* v. *Angus* ((1881), 6 App. Cas. 740), the *locus classicus* of the law on the whole subject. Recently (in *Newcastle Corporation* v. *Wolstanton*, [1947] 1 All E. R. 218), the Court of Appeal confirmed that the natural right of support was applicable to strata of the subsoil, such as those enjoyed by a gas undertaking in its pipes, although in that particular case, it was held that the right was taken away by statute.

Mining operations have been held to be a " natural user " of one's land, so that if water should collect on a parcel of land as a consequence of such operations, and thence escape to the injury of the neighbouring land, the mining owner will not be liable under the doctrine of *Rylands* v. *Fletcher* for the escape of a dangerous thing from his land (*b*). If, however, such water should have the effect of letting down the surface of the adjoining land by the natural process of erosion, it might be argued that the mining owner would be liable for an infringement of the natural right of support. Nevertheless, in *Rouse* v. *Gravelworks, Ltd.* ([1940] 1 K. B. 489), the Court of Appeal held that, provided the mining owner confined himself to a " natural user " of his land, he would not be legally responsible for the letting down of the surface of his neighbour's land in these circumstances, " because it is the natural result of the operations of nature, for which the natural user of our [the defendants'] land may have given the occasion, but for which we are not responsible as having caused it " (*per* MacKinnon, L.J.). The natural right of support is therefore somewhat precarious, capable of being infringed only by the direct consequences of the defendant's acts; the operations of nature, although they must have been in the contemplation of the defendant, are apparently sufficient of a *novus actus interveniens* to break the chain of causation. With respect, it seems that the demarcation between the two lines of reasoning is very fine and that in *Rouse's Case* the Court extended the principle of such decisions as *Hurdman* v. *N. E. Ry.* ((1878), 3 C. P. D. 168, at p. 174), where Cotton, L.J., expressly reserved the case of " support for the surface to which every owner of property is entitled ", across the line of decisions culminating in *Dalton* v. *Angus*.

Easement of Support

" Support to that which is artificially imposed upon land cannot exist *ex iure naturae*, because the thing supported does not itself so exist ", said Lord Selborne in *Dalton* v. *Angus*. Nevertheless, support to a building by the adjacent (or subjacent) land, or by another's building built thereon, may be acquired as an easement recognised by law, by means of a specific grant (express or implied), or by prescription.

The specific grant of an easement of support, by separate deed or by way of exception or reservation in a conveyance, affords no particular difficulty in practice, and precedents will be found in all the standard works. Easements of support will, on the severance of an outside wall of a house " with the intention of making such wall a party

(*a*) See, *e.g.*, *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503.
(*b*) As was held on different facts in *Giles* v. *Walker* (1890), 24 Q. B. D. 656.

wall between such house and an adjoining wall to be built ", be implied in favour of both grantor and grantee, such " as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall " (*per* Parker, J., in *Jones* v. *Pritchard*, [1908] 1 Ch. 636). An easement may also be implied by the operation of the presumption against derogating from a grant, as in *N. E. Ry.* v. *Elliott* ((1860), 1 J. & H. 145), and a similar right, based on the same principles, would be implied in a grant of land for the purpose of building thereon: *Rigby* v. *Bennett* ((1882), 21 Ch. D. 559). Except for cases falling within the above, however, an easement of support will not readily be implied, and in *Howarth* v. *Armstrong* ((1897), 77 L. T. 62, at p. 66), Lindley, L.J., went so far as to say " to stipulate for a further easement of support, if wanted, might be reasonable enough, but such an easement cannot be implied on the ground of necessity, nor upon any other principle with which I am acquainted ".

The rules for the acquisition of an easement of support by prescription are the same in principle as those for any other easement. *Gale on Easements* (11th ed. at p. 392), suggests that the decision in *Dalton* v. *Angus* " may be taken as establishing the rule, that twenty years' enjoyment of support to a building, whether from the adjacent or the subjacent land, being peaceable, open and as of right, will . . . confer the right to have the support continued ". In practice, although the *de facto* enjoyment will be peaceable enough, a right of support may not always be enjoyed " openly ", and with the full knowledge of the servient owner. However, it is clear that this requirement must not be pressed too far so as to prevent the acquisition of a prescriptive easement in all such cases. In *Lloyds Bank* v. *Dalton* ([1942] Ch. 466), Bennett, J., adopted a paragraph from the judgment of Romer, L.J., in *Union Lighterage Co.* v. *London Graving Dock Co.* ([1902] 2 Ch. 557, at p. 570), in which " open " enjoyment was explained as being " of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment ". In *Lloyds Bank* v. *Dalton*, therefore, although the dominant tenement could not be seen from the servient tenement, nor from any public highway to which the owners of the servient tenement had a right of access, it was held that the " successive owners of the dyeworks [the servient tenement] assuming them to have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have had a reasonable opportunity of becoming aware of the fact that the dyeworks were supporting the dominant tenement ".

Moreover, the owner of the quasi-servient tenement, in the case of an easement of support in course of prescription, is in a peculiarly precarious position. In the case of an inchoate easement of light, the prospective servient owner can easily prevent an easement from being acquired by putting up a screen, although in these days of the control of building under the Defence Regulations, it may be difficult to obtain the necessary licence and timber. Such a servient owner in the case of an inchoate easement of support, however, must either dig a hole in his land, or even more churlishly, pull down his own building so as

to cause the fall of that of his neighbour. The more effective course, but one not always adopted in practice, is to take a periodical acknowledgment from the dominant owner, if he can be made to agree—no easement would then be acquired, for the prescription would be *precario*.

An easement of support, whether acquired by grant or by prescription, merely entitles the dominant owner to insist that the support, to the extent to which the easement has been acquired, afforded by the servient land or building is not removed by any act on the part of the servient owner. The servient owner is under no obligation to keep his tenement in repair (*c*), and, therefore, if his house falls through old age or lack of repair, thereby causing the fall of the dominant tenement, the dominant owner has no cause of action, but the "owner of a servient tenement cannot so deal with it as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the owner of the dominant tenement" (*d*).

Although a building cannot claim a natural right to be supported by the adjoining premises, it does not invariably follow that where an easement cannot be proved, the owner of the quasi-dominant tenement has no remedy in the event of his premises being injured by the demolition or excavation of the adjoining property. In some of the older textbooks, it was said that an action was maintainable against a landowner for negligence for removing the support afforded by his land (or building) to a "modern" house (*i.e.*, one in respect of which no easement could have been acquired by prescription by reason of its recent erection). Thus in *Colebeck* v. *Girdlers' Co.*, *supra*, it was suggested that the negligent removal of support to a building might give rise to an action, irrespective of any question of an easement. In *Biscoe* v. *G. E. Ry.* ((1873), L. R. 16 Eq. 636), the railway company had acquired some houses in a terrace, and in removing these had caused damage to the plaintiff's adjoining houses. As no easement of support could be claimed, no compensation was payable under the Lands Clauses Consolidation Act, 1845, but as it appeared that by taking due precautions the company might have avoided causing such damage, the plaintiff was granted an injunction to prevent further injury, and an inquiry as to damages. This duty to exercise care towards one's neighbour's building, however, only limits the power to deal as one likes with one's own, in so far that care must be exercised where the "quasi-servient" owner has knowledge of the existence on his neighbour's land of structures which might be injured by acts done on his own land. This necessity for knowledge to establish a duty of care in this context involves actual knowledge—apparently no duty of knowledge can be imputed to the quasi-servient owner, and whether or not he knows of the existence of his neighbour's structure, he is not obliged to give notice to his neighbour of his intention to demolish. Where the quasi-servient owner is not in fact aware of the existence of his neighbour's building, he is not under any obligation to exercise care in the manner in which he pulls down his own building (*e*).

(*c*) *Colebeck* v. *Girdlers' Co.* (1876), 1 Q. B. D. 234.
(*d*) *Per* Parker, J., in *Jones* v. *Pritchard*, *supra*.
(*e*) *Chadwick* v. *Turner* (1839), 6 Bing. N. C. 1.

Apparently if he *does* give such notice, this will be a complete answer to any allegation of negligence on his part (*f*).

The owner of a building to which the benefit of an easement of support is attached must maintain his premises in sufficiently good repair so as not to increase the burden on the servient tenement (*g*). He is therefore not entitled to re-construct his building so as to throw any additional weight on to the servient tenement; in some cases the modern practice of converting large houses into several flats might offend against this principle. Moreover, an easement is acquired—by grant or by prescription—in respect of a particular building, and can only be enjoyed in respect of that building. Therefore it would seem that even a building identical with and erected on the same site as a building which had been destroyed, and which had enjoyed the benefit of an easement of support, is not entitled as of right to claim the benefit of the easement (*h*).

Party Walls

The principles of the above propositions apply equally to party walls, but as this topic has received the special attention of the Legislature, it is worthy of particular mention. Williams on *Vendor and Purchaser* (4th ed., at p. 471), observes that at common law "the common user, for the purposes of support, of a wall separating the houses or buildings of two different owners is evidence *prima facie* that the wall and the land on which it is erected would have belonged to them as tenants in common in equal shares". A wall may, however, have been built wholly on the land of one owner, or half on the land of one owner and half on the land of the other, or otherwise. In *Jones* v. *Pritchard*, *supra*, Parker, J., said, "subject, however, to the easements of which the grant or reservation will be so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may respectively deal with such moieties in such manner as they please". Similarly, subject to the intention of the parties, each owner is liable to keep his own moiety of the party wall in repair : *Sack* v. *Jones* ([1925] Ch. 235).

One of the leading features of the Law of Property Act, 1925, was the abolition of legal tenancies in common, thereby—it was claimed by the protagonists of the Act—"simplifying" the law of joint ownership in land. This policy made necessary some special treatment of the topic of party structures, and in section 38 of the Act it was provided, in effect, that where the circumstances of a party structure are such that but for the Act a legal tenancy in common thereof would have been created, the structure should be treated as being severed vertically, and the owner of each part thereof should have such rights of support and user as might be necessary to give him rights corresponding to those he would have enjoyed in the structure but for the Act. The effect of the section has been considered in two cases. In *Apostal* v. *Simons* ([1936] 1 All E. R. 207), it was held that where the section applies (*i.e.*, where a tenancy in common would have existed

(*f*) See the South African case of *United Building Society* v. *Lemmon*, [1934] App. D. 149.

(*g*) See, *e.g.*, *Birmingham Corporation* v. *Allen* (1877), 6 Ch. D. 284.

(*h*) On a similar problem in a different field of law, see the interesting case of *Ellis & Sons* v. *Sisman*, [1948] 1 All E. R. 44.

before 1926), if a party wall falls, the owner of a moiety thereof can recover only in respect of the particular moiety. Similarly in *Upjohn* v. *Seymour* ([1938] 1 All E. R. 614), it was held that the owner of the one moiety of a party wall is entitled to support from the other. Where the section applies (but not otherwise) any person interested may apply to the Court to make an order declaring the respective rights and duties of the parties interested in a party structure, but this is a provision not frequently used in practice. In the first place, it is not always clear that a tenancy in common would have subsisted in the structure but for the Act, and secondly, by the time the dispute comes into the hands of solicitors, it is frequently too late for a mere declaratory judgment, without any injunction and/or order as to damages, to settle the matter to the parties' satisfaction.

The Effect of Statutes

Generally speaking, the principles above discussed apply to cases where the demolition of the servient (or "quasi-servient") tenement is effected under statutory powers by a local or other public authority. Some statutes compel the authority concerned to take action (*e.g.*, to ensure repairs are carried out, or to demolish) regarding a property in certain circumstances; others merely empower the authority to take action if they see fit to do so—and it is this wide administrative discretion which is the more common feature of modern statutes. However, once an authority has been obliged or has elected to take certain action under statute regarding a particular property, the statute in question normally prescribes a particular procedure that must be observed. Normally, also the rights and liabilities of private individuals who will be affected by the authority's action will be reasonably well defined, although this is not always the case in respect of the right of support with which we are here concerned, and it is now proposed to consider some of the statutory powers (and duties) of this nature that will be met with in the average practice. The private practitioner may well find himself faced with intricate problems of specialist law that have previously been left to the town clerks and other local government lawyers. When local authorities and such bodies as the British Electricity Authority are allowed to proceed with their major schemes of slum clearance and redevelopment, the demolition of property supporting adjoining buildings must become a phenomenon of almost every-day occurrence, but even under present-day conditions, local authority housing schemes are sufficiently numerous to provide a number of examples of such events.

The Housing Act, 1936

Under section 11 of the Housing Act, 1936, the local housing authority (*i.e.*, the county borough or county district council) may order the demolition of a "working-class" house which they are satisfied is unfit for human habitation, and is not capable at a reasonable expense of being rendered so fit. In default of such demolition being carried out by the owner, the authority may demolish the property themselves (section 13, *ibid.*). A similar procedure exists under section 26 of the same Act, in respect of a number of houses where a clearance area has been defined by the authority under section 25.

If any house so demolished adjoins and gives support to a house that is not directly affected by the authority's proposals, it was suggested in *Bond* v. *Norman* ([1939] 2 All E. R. 610), that, as the owner of the servient tenement was acting in execution of an Order confirmed by the Minister of Health under statutory authority, he might demolish his property without regard to the rights of the dominant owner entitled to an easement of support. The Court would not accept this argument, for " no authority has been cited to me which suggests that an act is any the less the voluntary act of the actor because it is done in compliance with an order of a local authority " (*per* Simonds, J., as he then was). The servient owner then refused to carry out the demolition ordered, and the local authority proceeded to exercise their default powers. The case again came before the Courts, and in *Bond* v. *Nottingham Corporation* ([1940] 2 All E. R. 12), the Court of Appeal were faced with the argument that the local authority, once they had been satisfied that the state of affairs contemplated by the Act existed, were under a statutory duty to secure the demolition of the premises, and following the principle of such cases as *Geddis* v. *Bann Reservoir* ((1878), 3 App. Cas. 193), they could not be held responsible for the consequences of executing their statutory duties. The Court, however, held that this did not entitle the authority to ignore an easement of support, which would virtually have amounted to the extinguishment of a property right without compensation (*i*). Liability in such a case would, however, only attach to the local authority if an easement of support could be claimed, or if negligence in the process of demolition, with full knowledge of the circumstances, could be proved (*k*). Moreover, the authority must observe meticulously the detailed procedure of the statute, as otherwise their acts would be *ultra vires*, and they would be liable for all damage caused, irrespective of negligence.

Compulsory Purchase

Local authorities acquiring compulsorily under statutory powers are now obliged to follow the uniform procedure set out in the Acquisition of Land (Authorisation Procedure) Act, 1946. This statute incorporates some of the provisions of the Lands Clauses Consolidation Act, 1845, and in particular section 18 thereof, which provides for compensation to be paid for " lands " acquired by virtue of the notice to treat. The term " lands " is defined in the 1845 Act (see section 3 thereof), so as not to include an incorporeal hereditament, and accordingly it would appear that no power exists to acquire compulsorily an easement of support; but in practice the enabling Act setting the 1946 Act procedure in motion will define " land " sufficiently widely to include such an easement (*l*).

The code of the 1946 Act does not apply, however, to acquisitions for the purposes of Part III of the Housing Act, 1936 (" Clearance and Re-development "), and to a few other relatively unimportant

(*i*) Compare the well-known case of *Metropolitan Asylums Board* v. *Hill* (1881), 6 App. Cas. 193.

(*k*) See, *e.g.*, *Biscoe* v. *G. E. Ry.*, *supra*.

(*l*) See definition of " land " in the 1946 Act: " ' land ' in relation to compulsory purchase under any enactment, includes anything falling within any definition of the expression in that enactment ".

cases. In the former instance the position with reference to the point under discussion is clear, for section 46 (3) of the Housing Act provides in a case of compulsory purchase under that Part of the Act that " all private rights of way and all rights of laying down, erecting, continuing, or maintaining any apparatus on, under or over that land and all other rights or easements in or relating to that land shall be extinguished ", subject to payment of compensation. A similar section in the Artizans' and Labourers' Dwellings Improvement Act, 1875, was before the Court in *Swainston* v. *Finn and Metropolitan Board of Works* ((1883), 52 L. J. Ch. 235), where it was held that the section meant what it said, and that the only remedy open to the owner of a right of support lost through the exercise of such compulsory purchase powers in respect of the servient tenement, was to claim compensation.

The 1946 Act procedure also does not apply to purchases effected under the Town and Country Planning Act, 1944, but this will no longer be of significance after July 1, 1948, the day when the Town and Country Planning Act, 1947, will come into operation, and the procedure under the 1946 Act applies to this new statute in full.

The Public Health Act, 1936

Under section 75 of the Towns Improvement Clauses Act, 1847, now incorporated (with amendments) in the Public Health Acts (*m*), the local authority has certain duties with regard to any " building or wall " deemed to be " in a ruinous state and dangerous to passengers " (on a neighbouring highway), and in particular, after an order of the justices has been obtained, they " shall with all convenient speed cause all or so much of such building, wall or other thing as shall be in a ruinous condition, and dangerous as aforesaid, to be taken down, repaired, rebuilt, or otherwise secured, in such manner as shall be requisite ". The local authority in certain circumstances will be under a duty to demolish, but if the premises concerned afford support to an " ancient " building, it seems that the principle of *Bond* v. *Nottingham Corporation, supra*, must apply, and the authority would be obliged to shore up the dominant tenement, the expenses of so doing being in law recoverable from the owner of the servient tenement in default. If there is no easement of support applicable, the authority again will not be liable, except under the circumstances discussed above when dealing with the position under the Housing Act, 1936.

Similar considerations apply to buildings demolished by a local sanitary authority under their powers to abate a statutory nuisance exercisable in default under section 93 of the Public Health Act, 1936. In this case the terms of the section enable the authority themselves to " do forthwith what they consider necessary to abate the nuisance and to prevent a recurrence thereof ". It is submitted that on a construction of these words, by analogy to the reasoning adopted by the House of Lords in a different context in *Liversidge* v. *Anderson* ([1942] A. C. 206), the Courts may inquire into the manner in which the authority acts (*i.e.*, carefully or negligently), but may not question what the authority does, provided the authority itself considers the action taken to be necessary in the circumstances.

(*m*) S. 160 (3), Public Health Act, 1875, and s. 346 (1), Public Health Act, 1936.

THE TOWN AND COUNTRY PLANNING ACT, 1947

By section 119 (1) of the Act of 1947, "land" is defined as meaning (not "including") "any corporeal hereditament, including a building as defined by this section, and in relation to the acquisition of land under Part IV of this Act, includes any interest or right in or over land". So far as the acquisition of property is concerned a local authority will therefore have power under sections 37 and 38 of the Act, when acquiring a building, to include in the acquisition an easement of support enjoyed by an adjoining tenement in respect of that building (*n*). The method by which the compensation payable for the compulsory acquisition of the easement should be assessed is, however, by no means clear. Assessment of compensation in general under the Act is provided for in Part V thereof, by the application of the Acquisition of Land (Assessment of Compensation) Act, 1919 (subject to certain amendments), but for the purposes of Part V—and, indeed, the whole of the Act except Part IV—"land" is defined to mean a corporeal hereditament or a building. Whatever the draftsmen of the Act may have intended by the term "corporeal hereditament", the expression is clearly not designed to include a legal easement. The Act is therefore silent on the measure of compensation payable in the circumstances under discussion, but it seems incredible that Parliament should have intended an owner of property to be deprived thereof without compensation (*o*), and the only reasonable solution seems therefore to be that (Part II of the Town and Country Planning Act, 1944, having been repealed by the 1947 Act, as from the "appointed day"), the rules of the 1919 Act ("land" for the purposes of that Act includes easements, etc.) should apply *in toto*, and in their original unamended form (*p*). The measure of compensation will therefore be—a strange one at the present day—that of the market price acceptable to a willing seller.

Similar principles apply, it is submitted, to a case where the local authority has ordered the demolition of a building under section 26 of the 1947 Act, in respect of which building an adjoining building enjoys an easement of support; such easement, being land for the purposes of Part IV of the Act, could only be extinguished by compulsory purchase, subject to payment of compensation. Under section 26 (2), the dominant owner would normally be a person who will be affected by the order (in the opinion of the planning authority), and therefore the authority should serve notice on him as well as on the owner of the building to be demolished (*q*).

REGISTERED LAND

Easements of support are overriding interests for the purpose of the Land Registration Act, 1925, and as such may, but need not, be noted on the register. Inchoate rights in course of prescription are also overriding interests, but there is no provision made in the Act

(*n*) Provided the "designation" in the development plan is widely enough drawn to include such easements.

(*o*) See, by analogy, the remarks of Sir Wilfrid Greene, M.R., in *Bond* v. *Norman*, *supra*, "I cannot help thinking that there would be some capriciousness in the Act of Parliament if that were the consequence".

(*p*) See s. 2 of the 1919 Act.

(*q*) Compare "Puzzle Corner" in *The Journal of Planning Law*, 1948, at p. 37.

for the creation of an easement of support (or any other easement for that matter) by implied grant, such as arises on the presumption against derogation from a grant (*vide supra*). The creation of an easement being a "disposition" for the purposes of the Act (*r*), it seems that the grantee of an implied easement cannot acquire any legal interest therein until the same has been registered (section 20 (1)), a practice which would but rarely take place in the case of an implied easement of support, and it is interesting to speculate on the effect of section 38 of the Law of Property Act, 1925, in the case of registered land. The dominant owner would thus have at best an equitable interest, and as this would presumably not be registered in the charges register of the servient owner's title, a purchaser or public authority acting under the statutes above discussed, acquiring the registered servient tenement, could safely ignore any easement of support, although such may have been clearly enforceable had the title not been registered.

FURTHER NOTES ON AGRICULTURAL TENANCY AGREEMENTS

By J. Muir Watt, M.A., Barrister-at-Law

A precedent of an agricultural tenancy agreement, framed in the light of the Agriculture Act, 1947, will be found elsewhere in this issue. Previous articles have called attention to some of the main effects of the Act upon the form and contents of such agreements (*a*). The following notes may give some further assistance to those who are concerned with this subject.

Tenant Right Compensation

Country practitioners, and indeed all who may be asked to draft or to advise upon agricultural tenancy agreements, are strongly recommended to study the First Report of the Committee on Agricultural Valuation (*b*), dated January 13, 1948. The Agriculture (Calculation of Value for Compensation) Regulations, 1948 (SI No. 185/1948) are based on the labours of this expert Committee, which includes some of the best known tenant right valuers in England and Wales. The Committee had the task of advising the Ministry of Agriculture what method of calculation should be prescribed for determining the value to an incoming tenant of the improvements specified in Part I of the Fourth Schedule to the Agriculture Act, 1947, and the tenant right matters specified in Part II of that Schedule. It is not possible to contract out of the statutory measure of compensation or method of calculation in the case of the improvements in Part I, but it is

(*r*) See s. 18, paras. (5) and (1) (c).
(*a*) *Ante*, pp. 15 and 170.
(*b*) H.M. Stationery Office, price 4d.

possible to contract out of the statutory provisions in the case of the matters specified in Part II. The Committee's Report explains clearly why it has been necessary to give the parties power to contract out in this case. Where a tenant entered into occupation prior to March 1, 1948 (the date of the commencement of Part III of the Act) he is given an option to receive compensation when he leaves either on the basis which would have existed if the Act had not been passed or under the Act. In many cases it will pay him to elect to go out on the old customary basis since this will produce a higher valuation than the Regulations. Now an incoming tenant who enters into occupation after March 1, 1948, and who is required to pay the higher valuation to which the outgoing tenant is entitled by virtue of such an election, will naturally wish to be compensated on the same basis when he in turn leaves. Unless he specifies this in his tenancy agreement, however, he will receive compensation according to the Regulations. His legal advisers should, therefore, consider, in conjunction with his agricultural valuer, whether, and if so in what manner, the statutory provisions should be modified. One of the aims of the compensation provisions of the Agriculture Act, 1947, was to reduce the high basis of ingoing valuation in certain parts of the country. Unfortunately, as the Committee on Agricultural Valuation point out, "it is the customs producing high valuations which will tend to be perpetuated by incorporation in tenancy agreements". Nevertheless, it is the duty of those advising an incoming tenant who has been required to pay a high ingoing valuation (as a result of the option given to the outgoing tenant by section 34 (2) of the Act) to point out to him that it is legally permissible to secure the same basis for his own outgoing valuation by contracting out of the Act. Contracting out should, however, be limited to what is necessary. The Committee on Agricultural Valuation have said:—

> "We have tried to frame recommendations in such a manner that the Regulations will provide fair and reasonable compensation in the great majority of cases. We hope that landlords and tenants and their professional advisers will find this to be so and will therefore refrain from specifying any different provisions in their tenancy agreements unless exceptional conditions make such provisions necessary (*c*).

A few examples of the manner in which the statutory compensation provisions might be varied are given in the precedent which is printed in this issue.

Is it Possible to Contract out of Section 31?

The question has been raised whether it is possible to contract out of the security of tenure provisions of section 31 of the Agriculture Act, 1947, by means of some general clause in a tenancy agreement by which the tenant undertakes not to give the counter-notice mentioned in section 31 (1). It is submitted that any such clause would be invalid as contrary to the policy of the Act and would be inconsistent with the limited provision in section 31 (3) (c), which gives the Minister a discretion to consent to a notice to quit served for a specific purpose,

(*c*) Report, para. 10.

mentioned in the tenancy agreement, for which the landlord held the farm before the creation of the tenancy. It is hoped at a later date to provide a precedent of a clause based on section 31 (3) (c). Meantime it will be observed that no attempt has been made to contract out of section 31 in the precedent included in this issue.

The Statutory Repair Clauses

Attention has previously (*d*) been called to the importance of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (SI No. 184/48), which prescribe the statutory clauses mentioned in section 37 of the Act. It is possible to contract out of these clauses, but in this case contracting out is controlled by the power given by section 37 (2) to either party to refer terms which substantially depart from the statutory clauses to arbitration. A departure may be capable of justification either because of the special circumstances of the landlord and the tenant or because of the special circumstances of the holding. Clearly, to take examples, it might very well be reasonable, where the landlord lives at a considerable distance from the holding, or is often abroad, for the tenant to undertake full repairing liability, which would of course be reflected in the rent. Again, where a number of adjoining holdings form part of one estate, it might be reasonable for responsibility for the maintenance of a common water supply system or a common sewerage system to be undertaken by the landlord, possibly with some contributions from the various tenants towards the expenses. The repair of bridges or of water meadow equipment might be fairly undertaken by the landlord in certain parts of the country, perhaps subject again to some contribution from the tenant. Some variations of this kind have been included, by way of example, in the accompanying precedent (*e*).

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING.*

Sale of land—innocent misrepresentation—misstatement of the amount of rents—no specific performance with abatement.—The position of innocent misrepresentation in contracts for the sale of land is always difficult. At Common Law innocent misrepresentation was no defence and no ground of action: the principle was *caveat emptor*. Under the Law Merchant and to some extent in Equity there grew up contracts *uberrimæ fidei* to which complete and accurate disclosure was necessary, and this may have given rise also to the principle that specific performance would be refused in the case of innocent misrepresentation. This, however, is quite different from the other rule in connection with specific performance that, where there has been an innocent misdescription of the property comprised in the contract so that the vendor cannot make a title to all the property in the contract, then, apart from special condition, both the vendor and the

(*d*) *Ante*, p. 170.
(*e*) *Post*, p. 371 *et seq.*

purchaser are entitled respectively to sue for specific performance, unless there is some other objection, such as substantial inability to convey what was contracted to convey: *Rudd* v. *Lascelles,* [1900] 1 Ch. 815. It is the difficulty of applying these distinctive principles, which sometimes arises, that was the basis of *Gilchester Properties* v. *Gomm,* [1948] 1 All E. R. 493, where the rents had been represented to be £449 10s. whereas, in fact, they were £398 10s. The purchasers brought an action for specific performance claiming an abatement in the price. Romer, J., held that the representation was not a term of the contract but an inducement held out to complete the contract, and that the action could not succeed because this would be to award damages for innocent misrepresentation.

The facts were that the amount of the rent was not stated in the contract, but the representation was made in inquiries preliminary to contract. The learned Judge held on the facts that the answer amounted only to a representation and did not form part of the terms of the contract. This is an aspect of preliminary inquiries that is very material and made more so by the Town and Country Planning Act, 1947, and the Agriculture Act, 1947, because many of the matters material thereto will be sought in preliminary inquiries. Relevant answers should be incorporated in the contract.

The decision was based on two authorities, namely, *Heilbut, Symons* v. *Buckleton,* [1913] A. C. 30, an application to take shares in a company, and *Rutherford* v. *Acton-Adams,* [1915] A. C. 866, a Privy Council case in which compensation was claimed after completion. In both cases there are strong *dicta* denying the right to compensation for innocent misrepresentation. *Powell* v. *Elliot,* 10 Ch. App. 424, apparently to the contrary, was explained on the facts disclosed on searching the record.

It should, however, be pointed out that there is nothing in the report to show that any consideration was given to the power conferred by Lord Cairns' Act, 1858, to award damages either in lieu of or in addition to specific performance. This power can only be exercised when a decree of specific performance could be granted: *Lavery* v. *Pursell,* 39 Ch. D. 518; but in such cases could be given although not available at Common Law: *Leeds Industrial Co.* v. *Slack,* [1924] A. C. 851, and cf. *Wilson* v. *Northampton, etc. Ry. Co.,* L. R. 9. Ch. 279. Nevertheless, on principle the decision seems sound enough, if a little difficult to reconcile with the purchaser's right to claim specific performance with abatement.

Conveyance—taken in name of husband—part of price found by wife—trust for sale and tenancy in common.—As we have pointed out more than once (and see particularly Vol. 9 pp. 45, 76) one of the many troubles arising from the present law of concurrent interests in land is that of the undivided share in equity which does not appear in the legal title. *Re Roger's Question,* [1948] 1 All E. R. 328, may give rise to a number of questions in this connection. Shortly, a conveyance was taken in the name of a husband, who also gave a mortgage for £900. The deposit of £100 was paid by the wife, so that, in fact, the husband paid nothing, but it was found as a fact that the wife looked to the husband to pay off the mortgage. The Court of Appeal on these facts upheld an order that the husband should hold the property upon trust for sale for the husband and wife in the shares nine-tenths and one-tenth for the husband and wife respectively.

The report does not give an account of the order so that it is not possible to say whether or not the order was a declaration that the husband already held the property on trust for sale or whether he was thereafter to

hold upon trust for sale. It is difficult to see how the order could, if asked, determine otherwise than that he already held on trust for sale. The implications of this decision are obvious in view of the present number of conveyances that are taken in the names of husband and wife. It is to be noted that in this case the wife was not joined in the conveyance at all. Whether this should really make any difference it is hard to tell except that it may be argued that if the wife is joined the presumption of advancement will arise. It is only a presumption and we would say once again that a purchaser would be well advised not to take a conveyance from a sole surviving joint tenant in such circumstances.

Town and country planning—New Towns Act, 1946—*duties of Minister.—Rollo* v. *Minister of Town and Country Planning,* [1948] 1 All E. R. 13; L. J. R. 817, is another example of the difficulty in controlling the exercise of the ministerial discretion by any form of legal proceedings. The Act requires consultation but is not specific as to how this consultation should take place. The Court of Appeal affirming the Court below (noted *ante,* p. 137) took the view that it was for the Minister to decide the method of consultation and obtaining information, but so long as that existed the Court could not interfere.

Requisition of land—requisition under the Defence Regulations and Supplies and Services (Transitional Powers) Act, 1945—*sub-delegation.—Blackpool Corporation* v. *Locker,* [1948] L. J. R. 847, may give a ray of hope to those attacking the ministerial powers. The case is very involved and is too limited in its facts to warrant a full note here. The point was that the Court of Appeal held that the requisition was invalid by the local authority because it requisitioned too much, was invalid as a requisition by the Minister because he had not reserved a power in his sub-delegated legislation and the local authority was not his agent. No doubt many cases of *ultra vires* will arise under this legislation, but it may be well to point out that ultimately for nearly all confiscation of property the *uncontrolled* discretion is vested in the Minister. When we say "uncontrolled" we mean that if the Minister pursues the correct course there will, in the absence of proof of bad faith, be no legal means of preventing the ultimate acquisition by the Crown. Discretion on the part of the objector may sometimes prevent a wider exercise of the compulsory powers.

Planning — agriculture — delegatus non potest delegare. — Another example of a successful attack upon the planning authorities and one of some general interest is *Allingham* v. *Minister of Agriculture,* [1948] 1 All E. R. 780. Here the County Agricultural Committee had directed its officer to determine which of the applicants' acres should be sown with sugar beet under the Defence Regulations. The officer directed the applicants who failed to comply with the direction and were prosecuted. On a case stated the Divisional Court held that the Committee was a delegate of the Minister and that under the regulations they had no power to delegate, hence under the rule *delegatus non potest delegare* the direction was invalid.

We may here point out that the case does not go so far as to suggest that the Minister by his delegated legislation could not make an order enabling a committee to which his powers had been delegated to delegate the powers to an official. The principle seems sound enough and is likely

to be of the first importance, because under nearly all the planning legislation a high proportion of the Minister's powers are to be delegated. In the case of the Agriculture Act, 1947, this has already been carried out to a very large degree (*ante* p. 214).

Tithe redemption annuity—land held by several owners—no apportionment—liability of single owner.—In *Tithe Redemption Commissioners* v. *Brown,* [1948] 1 All E. R. 752, the Court of Appeal held that where no apportionment has been made in accordance with the Act the Commissioners have the right both to compulsory redemption and to recover the whole of an instalment against one of several owners under the Tithe Act, 1936. There is nothing in the Act which requires the Commissioners to make an apportionment as a condition precedent to seeking to compel redemption or to recover an instalment due. If an owner pays more than is due from his interest in the land he must claim against the other owners under section 13 (7). The learned Master of the Rolls expressed the opinion that in the event of a single owner being called upon to pay the whole instalment it would be for the Commission to make "some sort of provisional *ad hoc* apportionment of the amount among the different owners". The same learned Judge also said that the charge under the Act created a charge "exactly comparable with the old tithe rentcharge save in the question of the amount".

(1 K & E., pp. 418, 419.)

Fee simple—dissolution of a limited company trustee—no determination of the fee.—Re Strathblaine Estates Ltd., [1948] 1 All E. R. 162; L. J. R. 905, gives the *quietus* to an academic discussion and also solves a practice point, namely, whether there is a reversion of a fee simple to the donor on the dissolution of a corporation. Here the limited company was a trustee for the shareholders of certain properties and, consequently, no question of reverting to the Crown under the Companies Act, 1929, s. 296 could arise. Jenkins J., held that a fee simple vested in a corporation (and not affected by section 296 of the Companies Act, 1929) does not determine by the dissolution of the corporation and whether or not it vests in the Crown it remains alive. It is not necessary to introduce the Law of Property Act s. 181 enabling a new fee simple to be created and the Court made a vesting order under the Trustee Act, 1925, s. 44 (ii) (c). Applications should not be made under section 181 of the Law of Property Act notwithstanding *Annual Practice,* 1946–47, p. 1058.

The view disposed of in this case was held by Challis, based upon Co. Litt. f. 13b, and was apparently adopted in *Hastings Corpn.* v. *Letton,* [1908] 1 K. B. 378; *Att.-Gen.* v. *Shadwell,* [1910] 1 Ch. 92; *Re Woking U.D.C.,* [1914] 1 Ch. 314. Of these authorities, only Challis and *Hastings Corpn.* v. *Letton* (*supra*) are referred to by the Court. The difficulty of the position is illustrated by the fact that the Court did not attempt to decide where the legal estate was pending the vesting order after the dissolution of the company. To suggest that it revests temporarily in the Crown is, of course, contrary to all mediæval notions; the Crown, having got an interest, would not have released it so easily. It is still more impossible to suggest that the fee simple should remain *in nubibus,* since this would involve an abeyance in the seisin. The present decision is common sense and convenient, but we confess to uneasiness because, in our experience of legal history, *facilis descensus Averni* and these slippery slopes are often greased by common sense and convenience. Nevertheless,

statute has played so many conjuring tricks with the legal estate that, perhaps, we shall lose sight of all principle of common application.
(1 K. & E., p. 1144, n. (h).)

Mortgage—sale by first mortgagee in possession—second mortgagee barred by Limitation Act.—Young v. *Clarey,* [1948] 1 All E. R. 197; L. J. R. 812, arose out of a claim by a second mortgagee to the proceeds of sale after satisfying the first mortgage, notwithstanding that his claim to a charge on the land had been barred by the statutes of limitation. This claim was based on a statement in *Coote on Mortgages,* 9th ed., and *Banning, Limitation of Actions,* 3rd ed., following the decision in *Re Alison,* 11 Ch. D. 284. Harman, J., held that *Re Alison* (*supra*) did not apply to such a case, and that under s. 105 of the Law of Property Act, 1925, a claimant to share in the proceeds of sale must show that he is entitled to the mortgaged property. As his claim on the property was barred by the adverse possession of the first mortgagee, he was not entitled to any of the proceeds of sale arising under an exercise of the statutory power of sale as mortgagee.
(Coote on Mortgages, 9th ed., Vol. I, p. 773, Vol. II, pp. 911, 912, 945.)

Mortgage—Liabilities (War-time Adjustment) Act, 1941, *as amended by the* 1944 *Act—payments made before application.*—In *Re Ginger,* [1948] 1 All E. R. 18, the Court of Appeal held that under the 1941 Act there was no power to vary the mortgage so as to direct that payments made after 1940, when the applicant's house was destroyed by enemy action, should be treated as payments in respect of capital and not interest. The payments were made under the usual mortgage repayable by instalments in which, of course, capital and interest are included.

On the other hand, the Court held that the fact that the applicant's difficulties were in part due to the death of her husband did not exclude her right to claim a variation in the mortgage. It, therefore, upheld the order eliminating future payments of interest after the date of the order until the property had been re-erected and was ready for occupation.

Settled land—trust for sale—consent order in divorce overriding trust for sale.—Bacon v. *Bacon,* [1948] L. J. R. 530, is an interesting illustration of the lack of effectiveness of the Settled Land Act, 1925, s. 1 (7). Here a husband and wife were joint tenants on trust for sale of the matrimonial home. On a divorce, a consent order was made conferring upon the wife a life interest in the premises. Willmer, J., held that the order constituted an "agreement for settlement" within section 1 (1) of the Settled Land Act, 1925, and that, therefore, her life interest took effect in priority to the trust for sale on the same principles as *Re Norton,* [1929] 1 Ch. 84; *Re Sharpe's Deed of Release,* [1939] Ch. 51; and *Re Hanson,* [1928] 1 Ch. 96.

What is remarkable about this decision is that the statutory trust for sale was already in existence, and that the effect of the order was to require the execution of fresh documents to give effect to the settlement. It is true that the consent order provided that the wife should have secured to her the occupation for life of the matrimonial home, but we should have thought that a tenant for life of the proceeds of sale without whose

consent the premises could not be sold would be in this position. The effect of creating her a tenant for life under the Settled Land Act seems to give additional powers—but the more important point is, what is the meaning of section 1 (7) of the Act. Here a trust for sale was already in existence and, therefore, the words of section 1 (1) would seem to be inapplicable. It may, however, be argued that the decision merely amounts to a ruling that the settlement (see *Smith* v. *Smith,* 114 L. J. P. 30) was varied by the order so as to constitute a life estate in priority to the trust for sale.

(2 K. & E. p. 610)

Sale of land—no lien for costs on failure of vendor's action for specific performance.—In *Combe* v. *Swaythling,* [1948] L. J. R. 392, Wynn-Parry, J., decided that there was no lien on the vendor's land for the purchaser's costs of the action where the vendor's claim for specific performance failed, unless, also, the purchaser could counter-claim for return of deposit. In this case the deposit had been paid to a stakeholder, and so no question of a claim for return against the vendor could be made. The authorities giving a lien for costs only applied when the purchaser was a secured creditor, and this only occurred where the purchaser could claim return of deposit and declaration of a lien in respect of the same.

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2. *CHARITIES*

Religion—public trust—evidence.—Re Coats' Trusts, [1948] 1 All E. R. 521, if not overruled or modified by the House of Lords should appeal be made, is likely to prove a leading authority on the nature of trusts for the advancement of religion owing to the careful judgments of Lord Greene, M.R., and Evershed, L.J. The decision affirms the decision of Jenkins, J. ([1948] L. J. R. 8) (noted, *ante,* p. 8). The question was whether a gift to a society of contemplative nuns would be a good charitable gift without evidence of any public services. It was held, following and affirming again *Cocks* v. *Manners,* L. R. 12 Eq. 574, that it was not.

There were two vital issues: first, a trust for the advancement of religion is not *ipso facto* for the public benefit; and secondly, whether or not there is a public benefit is a matter of fact on which the Court must make up its mind upon the evidence before it "in accordance with the ordinary rules of evidence on which a lay tribunal can be said to found its opinion": *per* Evershed, L. J., at p. 532. In determining these issues, the judgments contain an examination of a number of decisions and are deserving of close study.

Adopting the expressions of Lords Wright and Simonds in the *National Anti-Vivisection Society* v. *I. R. C.,* [1948] A. C. 31, the Court clearly laid it down that a trust for the advancement of religion to be charitable must also be for the public benefit. In most cases this will be presumed, because *prima facie* it is for the public benefit, but if the public benefit is called in question, then the question depends upon evidence. This evidence must show, *apparently,* that the public or some part of it must benefit as well as the recipients of the gift, and it must also show a direct benefit and not merely an indirect one (notwithstanding the words of

Wickens, V.-C., in *Cocks* v. *Manners* (*supra*)). This may be illustrated from the handling by the Court of the decision in *Re Caus,* [1934] Ch. 162, where a gift for "foundation masses" was held to be a valid charitable gift. The learned Judges in their judgments were prepared to admit the correctness of that decision on the ground that it provided for the maintenance of priests and, perhaps, of public celebrations of the mass, a central rite of the Catholic Church, but were not prepared to take the view that, because the Catholic Church recognised their value, such masses were *ipso facto* for the public benefit. The argument that the Cardinal Archbishop had filed an affidavit deposing to the "edification" of the people by the existence and lives of such pious people as the contemplative nuns was likewise dismissed on the ground that it involved no public act bringing religion to the "public" or a part of it.

Another example of a trust for the advancement of religion which was not charitable was a gift to endow a private chapel in a country house: *Hoare* v. *Hoare,* 56 L. T. 147. Another case, not cited in the instant case, was a gift to a society for the suppression of cruelty to animals by private prayer because the intention was the improvement of members by prayer: *Re Joy,* 60 L. T. 178.

It does not appear to be open to the Court to question the benefit to the public of the doctrinal views of any religion (possibly in the absence of any proof that such are detrimental, if this could be shown), but it must be "public" religion. The self-sanctification of members of a religious society alone, though it may be for the advancement of religion, is not as such a charitable trust.

(Tudor, p. 17.)

Religion—gifts to religious persons—limitation to "religious purposes".—Two cases are reported on discretionary gifts to "religious persons". When gifts are made to persons, such as the Archbishop of Westminster, two questions arise: first, whether they are gifts to individuals or persons *virtute officii;* and secondly, whether any limitations are wide enough to permit of the property being devoted to non-charitable purposes. *Re Flinn,* [1948] 1 All E. R. 541; L. J. R. 923, brings out the point that a gift *virtute officii* with an entirely open discretion will constitute a charitable gift, and the discretion will be limited within the province of religious purposes that are charitable. In this case the gift was to "His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit". It is only necessary to consider the views of the Archbishop as expressed in *Re Coats' Trusts* (*supra*) to see that such a discretion might include *prima facie* purposes that were non-charitable. Nevertheless, the line of authority followed by Jenkins, J., in this case makes it clear that where no particular purposes are mentioned at all, the discretion is limited, and so the gift is valid: cf. *Re Norman,* [1947] Ch. 350 (noted vol. 11, p. 283).

These cases have to be distinguished from *Farley* v. *Westminster Bank,* [1939] A. C. 430; L. J. R. 917, where a gift to the vicar and churchwardens "for parish work" was held not charitable. It was this point which was the essential issue in *Re Eastes,* [1948] 1 All E. R. 536, where Jenkins, J., held that a gift to the vicar and churchwardens "for any purposes in connection with the said church which they select" was a valid charitable gift notwithstanding that there was superadded a direction that they should "bear in mind the requirements of the children of the said parish" and should not "use any portion of the said moneys in connection with the

furtherance of overseas missions". It was argued that the "requirements of the children" introduced a wider meaning than the advancement of religion, and included parochial purposes in the nature of a gift for parish work. The learned Judge adopted a narrower construction and adopted the character of interpretation used in *Re Bain,* [1930] 1 Ch. 224, where the gift was "for such objects connected with the church as he shall think fit". Hanworth, M.R. (at p. 232), said: "It is not disputed that if the objects were confined to the support of the church, its fabric and its services, that would be a good charitable bequest. I see no reason to import into 'objects connected with the church' parochial activities which would embarrass our interpretation as an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the vicar". The learned Judge distinguished *Re Davies,* 48 T. L. R. 539, which was a gift "for work connected with the Roman Catholic Church in the said Archdiocese" and was held non-charitable. The ground of distinction was that the gift did not relate to any specific church, its fabric and services, but it related to the work carried on by the religious body known as the Roman Catholic Church in a particular Archdiocese. It is important to observe not merely the form of the valid gift, but the limitations put upon its use. What constitutes the "advancement of religion" is too obscure to be stated in a short note, but at least we can say that not all church activities conduce to it, notwithstanding *Re Simson,* [1946] 2 All E. R. 220, which must be related to a gift to a vicar.

(Tudor, p. 33.)

Income Tax—company "established for charitable purposes only".—One of the sources of confusion in the law of charities is the fact that the question arises from two separate angles: (i) whether or not a gift or grant is a charity in compliance with the rules of law for dispositions of charity property; (ii) whether or not a particular fund or income is exempt from tax under the Income Tax Act, 1918, and the Finance Act, 1921, s. 30, as amended by the Finance Act, 1924, s. 24, both these Acts, of course, only replacing earlier exemptions. The confusion is worse confounded because quite a number of the decisions on charities in relation to tax are reported only in the Reports of Tax Cases issued by the Stationery Office and not usually to be found on the practitioners' shelves. But the essential difficulty arises from the fact that although "charity" means the same in both cases, it must not be assumed that the result will be the same in either case in favour of the object claiming to be a charity. In tax cases the only material issue is whether or not any particular revenue falls within the Acts and can claim exemption by reference to the particular wording. The Acts refer to different forms of property and treat them differently. Consequently, in using these different type of cases the conveyancer needs to consider the particular issue and, in drafting any relevant documents, to bear in mind the particular points involved. *Tennant Plays, Ltd.* v. *I. R. C.,* [1948] 1 All E. R. 506, is an illustration of this issue. By the Finance Act, 1927, s. 24, it is provided that the profits of a trade carried on by any charity are exempt where either (i) the trade is exercised in the course of carrying out the *primary* purpose of the charity, or (ii) the work is mainly carried on by the beneficiaries of the charity, and in either case that the profits are *solely* applied to the purposes of the charity. This amendment was rendered necessary by the decision in *Brighton College* v. *Marriott,* [1926] A. C. 192, where the revenue of a school not carried on for profit was held to fall within the Finance Act, 1921, because the school was the beneficiary, and hence,

the House of Lords held that the second alternative (the only one provided by the 1921 Act) could not apply. *Tennant Plays, Ltd.* v. *I. R. C.* (*supra*) turned upon the application of the first alternative. In this case a company limited by guarantee had been formed to assist in carrying out the purposes of the Council for the Encouragement of Music and the Arts (C.E.M.A.), but the memorandum included power to present, promote, etc., all kinds of shows "whether educational, partly educational, or scientific . . . for philanthropical or charitable purposes", and to carry on business as proprietor of theatre, music hall, concert hall, etc., "as ancillary to the foregoing objects". It was admitted that the first purpose set out in the memorandum, which was the promotion and advancement of the arts and music, was charitable, and it was argued that this was the primary purpose and all other purposes were ancillary or secondary. The Court of Appeal held that the existence of these additional powers in the memorandum prevented the claim to exemption being established. Basically the question turned upon the construction of the memorandum, and whether, in the opinion of the Court, the company could carry on the purposes mentioned in the memorandum for any non-charitable purposes. If the Court could have held that the powers could only be used to promote charitable purposes, the appeal would have been successful.

More important than the decision itself is the discussion of the earlier authorities and, in particular, certain passages in *I. R. C.* v. *Yorkshire Agricultural Society*, [1928] 1 K. B. 611; *National Anti-Vivisection Society* v. *I. R. C.*, [1948] A. C. 31; and *Keren Kayemeth* v. *I. R. C.*, [1932] A. C. 650. In all these cases, or rather in the expressions of opinion discussed, there is a suggestion that some of the purposes which are incidental need not be charitable, and yet the claim to charity may be good for the purpose of the exemption. It is a well-known difficulty in drafting charity trust deeds to avoid the inclusion of some purpose that may not be charitable. Cohen, L.J. (at p. 510), remarked: "I think the principle that one must look only at the main or dominant purpose of the company must be taken with a little reserve. I feel some doubt whether a company can be said to be established 'for charitable purposes only' if it carried on a substantial non-charitable purpose, for instance, to take the case suggested by Somervell, L.J., during the argument, if it took power permanently to run a public house in order to produce funds for its charitable purpose". In *I. R. C.* v. *Yorkshire Agricultural Society* (*supra*), where the society successfully claimed exemption from tax for dividends, the objects were diverse and conferred some benefits on their members; these benefits were not held to interfere with the dominant charitable purpose: cf. *Geologists Assocn.* v. *I. R. C.*, 18 Tax Cases 271.

It is suggested that the law remains far from clear. In making a grant or gift to a charitable purpose with intent to avoid perpetuity or other property rules, the possibility of application for a non-charitable purpose seems widely construed, and it is rare to meet a case, such as *Re Hood*, [1931] 1 Ch. 240, where the Court of Appeal held that the trust was for advancement of religion, notwithstanding the testator's reference to stopping the drink traffic; otherwise such decisions as *Farley* v. *Westminster Bank*, [1939] A. C. 430, would not be possible. In tax cases, more attention appears to be devoted to the dominant purpose, though *motive* is irrelevant, *Keren Kayemeth* v. *I. R. C.* (*supra*), but probably only to the extent that such purpose, if found, is held to control the activities of ancillary powers within the limits of a charitable purpose. With respect, we do not see the significance of the power "*permanently* to run a public house". What is the difference between providing annual entertainments, or even sporadic entertainments, with a view of profiting the charity, and doing so permanently?

This gives rise to the whole problem of running a business otherwise taxable under Schedule D in connection with a charity. For instance, under the old law it was held that a restaurant run at a profit by the Y.M.C.A. was taxable, and its profits could not be set off against losses in connection with the educational activities (admittedly charitable) of the society: *Grove* v. *Young Men's Christian Association,* 4 Tax Cases 613. This would now be regarded as incidental to its charitable purposes, or so we believe. But the topic is too wide for treatment in this note. We would suggest, however, that where incidental powers are required, these should be expressed to be incidental and not in the form customary in a memorandum of association, and, furthermore, that they should be limited to be exercisable so far only as they may be exercised in furtherance of the charitable purpose.

(Tudor, p. 397.)

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3. *WILL CASES*

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law

Condition against marrying a Roman Catholic—whether void for uncertainty—whether limited to marriage under twenty-one.—Re McKenna, [1947] I. R. 277, is a good illustration of the difficulty of applying the present law of testamentary conditions. The testator was a Protestant Irish farmer. He gave property upon trust for the maintenance, education and advancement of his daughter (then aged sixteen) until she attained twenty-one or married, and then to the daughter for life, and, after her death, upon trusts for her issue, with a gift over if she married a Roman Catholic. When the testator died, his daughter was twenty years old; four years later she married a Roman Catholic. The question was whether the gift over took effect. It was, of course, strenuously argued on behalf of the daughter that the gift over was void for uncertainty, and *Clayton* v. *Ramsden,* [1943] A. C. 320, was cited in support of that proposition. In that case the House of Lords held that a gift over, if the legatee married a person not of Jewish parentage and of Jewish faith, was void for uncertainty. The decision caused some surprise and seemed to cast doubt on testamentary conditions which had hitherto been regarded as valid. Not unnaturally, Courts which are not technically bound by decisions of the House of Lords have sometimes refused to follow it. In the instant case Gavan Duffy, J., would have none of it. "I am confronted", he said, "by a familiar expression, used by a Protestant farmer in his will. I know what he meant, and practically every citizen in every walk of life, be he Catholic or Protestant, knows the meaning conveyed by the words 'marry a Roman Catholic'. I wish to state emphatically that I do not concern myself with any theological definition of membership of the Church. I have only to construe the plain words used by a plain man in a sense plain to all of us; and I shall not make the law justly ridiculous in the eyes of persons of common sense by declaring a current expression, which the People knows and understands, to be unintelligible in the High Court of Justice of Ireland. I think it would be hard to find an expression that conveys more clearly exactly what it means throughout this country. We say that a man is a Catholic or he is not; if he is, then in ordinary parlance, whether he be a good Catholic or a bad Catholic or an indifferent one, a Catholic he remains".

The result was that the gift over was not void for uncertainty, and would have worked a forfeiture had not the learned Judge felt able to decide in favour of the daughter on a ground which counsel originally had not argued, namely, that the condition must be read as relating to a marriage taking place before she attained twenty-one. "A girl's father who strives by his will and by other means to protect her during her minority against contracting a marriage with any man of a religion which he abhors, is doing his duty by the child and is acting within his rights; that is his legitimate exercise of *patria potestas* over a young girl whose moral welfare is committed to his care. But, so much being conceded, he ought to recognise the new status acquired upon her majority". But, with respect, the question was not what the testator ought to have done as a matter of moral duty, but what his will meant as a matter of legal construction. If he had intended to limit the gift over to marriage under twenty-one, it would have been easy for him to say so.

(Theobald 431, 439, 464, n. 82.)

Gift to wife during widowhood—widow's second marriage annulled.— English law recognises a clear distinction between void and voidable marriages. In English law, a marriage may be void for bigamy, consanguinity, lack of form, lack of age or lack of consent. A marriage may be voidable if it has not been consummated owing to the impotence of one of the parties, or in four statutory cases under s. 7 of the Matrimonial Causes Act, 1937, of which the most important case is if the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it. The difference between the two types of invalidity is clearly stated by the Master of the Rolls in the most recent case on the subject, *De Reneville* v. *De Reneville,* [1948] P. 100, 111: "A void marriage is one that will be regarded by every Court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it. A voidable marriage is one that will be regarded by every Court as a valid subsisting marriage until a decree annulling it has been pronounced by a Court of competent jurisdiction. In England only the Divorce Court has this jurisdiction". But whether the marriage is void or voidable, the decree of nullity relates back to the ceremony and declares that the marriage never existed: it declares the marriage "*to have been* and to be absolutely null and void, to all intents and purposes in the law whatsoever" and that the petitioner "*was* and is free from all bond of marriage with the respondent". This relation back of the decree annulling a voidable marriage produces some very bizarre situations and sometimes actual hardship. Thus, in *Dredge* v. *Dredge,* [1947] 1 All E. R. 29, a man and woman married; shortly after the marriage a son was born as a result of pre-marital intercourse; seventeen years later the man obtained a decree of nullity on the ground that the *marriage* had not been consummated owing to the wilful refusal of the respondent; the effect was to bastardise the son.

Among the finest of the fine distinctions created by this unfortunate doctrine of relation back must now be reckoned that between the two cases of *Re Eaves,* [1940] Ch. 109, and *Re Dewhirst,* [1948] Ch. 198. In *Re Eaves* the testator gave property to his wife and son as trustees upon trust for the wife during her widowhood and subject thereto upon trust for the son. The wife went through a ceremony of marriage with X; to all intents and purposes her widowhood determined, and she therefore agreed to the property being handed over to the son. Twelve years later

her second marriage was annulled on the ground of X's incapacity to consummate it, and she claimed to be entitled to resume her life interest in the trust property. It was held by Farwell, J., and the Court of Appeal that this not very meritorious claim failed, but unfortunately the learned Judges were not in agreement as to the reasons. Farwell, J., held that, as a matter of construction, the wife's widowhood had never determined, but that as she had been a party to the handing over of the property to the son, she was barred by acquiescence. The Court of Appeal, on the other hand, held that the wife's widowhood determined when she went through the ceremony of marriage with X, and that she could not seek to re-open a closed transaction after the decree of nullity. But Clauson, L.J., also relied on the reasons given by Farwell, J.

In *Re Dewhirst* the testator directed his trustees to pay the whole of the income of his residuary estate to his wife during her life provided she should continue his widow, and, upon her re-marriage, to continue to pay her one-half of the income during the rest of her life, and subject thereto he directed that his residuary estate should be held on trusts for the benefit of his children. The widow re-married after the testator's death, and five years later the marriage was annulled by reason of the incapacity of the husband to consummate it. Harman, J. (who had been unsuccessful counsel in *Re Eaves*), held that the wife's widowhood had never determined and that from the date of the decree she was once more entitled to the whole of the income. It was unnecessary for him to decide whether she was entitled to the whole of the income from the date of her re-marriage, since the whole of the income had in fact been paid to her, one-half beneficially and the other half as guardian of her two infant children. The learned Judge pointed out that there was a difference between saying that a person is entitled to property after the annulment of a marriage, and upsetting transactions completed while the "marriage" was current. Nevertheless, it is submitted that such fine distinctions are not creditable to the administration of the law, and that they can scarcely fail to frustrate the intentions of testators. It is greatly to be hoped that a form of decree which dates from a time when a marriage was regarded as indissoluble should be abolished in the case of voidable marriages: see the observations of Lord Greene, M.R., in *De Reneville* v. *De Reneville*, [1948] P. 100, 110, and those of Goddard, L.J., in *Re Eaves*, [1940] Ch. 109, 122. There is much to be said in favour of assimilating decrees annulling voidable marriages to decrees dissolving marriages. The substance of the matter is that the marriage is dissolved, and that ought to be reflected in the form of the decree. As Lord Greene points out, the retrospective operation of a nullity decree is particularly anomalous in the case of the statutory ground for nullity mentioned above, since that ground, unlike all the other grounds for nullity in English law, necessarily arises after the date of the ceremony.

(Theobald 207.)

"All my stocks and shares"—"all my personal estate".—Re Purnchard, [1948] 1 All E. R. 790, is an excellent example of the modern method of construing home-made wills. The testator gave all his possessions to his wife during her life, and at her death gave his freehold house and its contents to X and all his stocks and shares to a hospital. X predeceased him, so that there was an intestacy as to the freehold house; the question was whether the hospital was entitled to all the testator's investments, or if not, which. At his death the testator left (a) the freehold house and its contents; (b) cash in hand and at the bank, which was

absorbed in paying his debts and expenses; (c) investments comprising (i) preference and ordinary shares and preference stock in limited companies; (ii) preference and ordinary shares and debenture stock of electricity supply companies; (iii) proprietary stocks in railway companies; (iv) debenture stock in limited companies; (v) British, dominion and colonial government stocks and municipal corporation stocks; (vi) bonds notes and certificates representing interests in the funded indebtedness or loan capital of foreign governments and municipalities. Jenkins, J., held that all these investments, or others into which they had been changed since the testator's death, passed to the hospital. The scheme of the will showed clearly that the testator intended to make a complete disposition of all his possessions after the death of his wife. The learned Judge distinguished *Re Everett,* [1944] Ch. 176, in which in very different circumstances it was held that " stocks and shares " meant only stocks and shares in a limited company and not holdings in loan capital, public utility companies or funded indebtedness. He said: " If a testator uses language which on its true construction necessarily falls short of his intention, then his intention must *pro tanto* be defeated; but it is equally clear that if his intention can be collected from the will as a whole, particular expressions must be construed so as to give effect to it so far as it is possible to achieve that result without doing violence to the language used. I am therefore of opinion that in the present case the gift of ' all my stocks and shares ' should receive the widest construction of which it is properly capable ".

A case on the other side of the line is *Re Cook,* [1948] Ch. 212, noted on another point, *ante,* p. 218. In that case it was impossible to give effect to the testatrix's manifest intention without doing violence to the language used. In a home-made will the testatrix made a gift of " all my personal estate ". It was held that this did not pass her interest in a freehold house which was subject to a trust for sale but impressed with a trust for reconversion into realty. " The words ' personal estate ' ", said Harman, J., " are words so well known to lawyers that it must take a very strong context to make them include real estate. Testators can make black mean white if they make the dictionary sufficiently clear, but the testatrix has not done so ".

(Theobald 155, n. 84, 167, n. 26.)

Soldier's will—on actual military service.—A soldier on actual military service or a mariner or seaman at sea can make a will of personal estate without complying with the formalities required by section 9 of the Wills Act, 1837, even though he is under the age of twenty-one: Wills Act, 1837, s. 11. The privilege is extended to wills of real estate by the Wills (Soldiers and Sailors) Act, 1918, s. 3. The meaning of the phrase " on actual military service " has occasioned much difficulty. Before the last war it was held that a soldier was on actual military service if he had taken a step (even in England) towards joining the forces in the field, for instance if he went into barracks under embarkation orders; but that he was not on actual military service if he was merely quartered at home or abroad in barracks. But since those days the extent of military operations has been very much enlarged both in depth and in height, and since 1940 it has been held that a soldier serving in an Army camp in England (*Re Spark,* [1941] P. 115; *Re Ryan,* [1945] I. R. 174) and a W.A.A.F. officer serving in England in Balloon Command and Bomber Command of the Royal Air Force (*Re Rowson* (1944), 171 L. T. 70) were on actual military service; but not a colonel in the Army Dental

Corps, who worked at command headquarters but lived at home (*Re Gibson,* [1941] P. 118 n.), nor a musketry instructor in the Home Guard who was not on duty and had not been ordered to stand to (*Re Anderson,* [1944] P. 1).

It has now been held by Pilcher, J., in *Re Wingham,* [1948] P. 138, that a member of the Royal Air Force under training for operational duties in Saskatchewan in 1943 was not on actual military service. It was impossible to say that the whole world was a theatre of war; and soldiers on actual military service ought to be limited to (1) those actually engaged on a campaign; (2) those proceeding or under orders to proceed or to hold themselves in readiness to proceed upon a campaign; and (3) those situated in a beleaguered fortress or war base from which active offensive or defensive operations are being conducted (*e.g.,* England from 1939 to 1945). The judgment contains a most valuable and interesting review of the decisions during the last 100 years.

(Theobald 48.)

Delusions of testator—will prepared by solicitor on instructions of lay intermediary.—In *Battan Singh* v. *Amirchand,* [1948] A. C. 161 (P. C.), the testator, an Indian moneylender, made his last will the day before he died. At the time of execution he was in the last stages of consumption and reduced by disease to extreme weakness. He was on good terms with his nephews, who benefited under several earlier wills drafted for him by his solicitors. Four days before he executed his last will the testator received a visit from a young man named Hari Charan and told him that he wished to make a will in favour of two men who owed him money, because they had looked after him so well, and that he had no wife or children but he had relatives for whom he had already sufficiently provided. Hari Charan went to another solicitor, who prepared a will in favour of the two men. This will declared that the testator had no next of kin or blood relations. The testator was too weak to sign the will, but he affixed his thumb mark with the help of the solicitor who had drafted it, and again declared that he had no relations. One of the beneficiaries under the will knew that this was untrue, but did not intervene to correct the testator's memory. The Privy Council refused to admit the will to probate on the ground that it was made under a delusion as to the existence of the testator's nephews, and therefore the testator was not of sound mind, memory or understanding. It was argued by those propounding the will, on the authority of *Parker* v. *Felgate* (1883), 8 P. D. 171, that if a testator gives instructions for a will at a time when he is of sound mind, memory and understanding, and a solicitor prepares the will in accordance with those instructions, the will is good, though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the will which gives effect to them. But the Privy Council held that the principle of that case ought to be applied with the greatest caution and reserve when the testator does not give the instructions directly to the solicitor, but through a lay intermediary.

(Theobald 23, 26.)

Signature of testator—whether partial signature sufficient.—In *Re Chalcraft,* [1948] 1 All E. R. 700, the testatrix was *in extremis* and had just been given a strong dose of morphia to relieve her pain, when she

was shown a paper prepared by her daughter. She was asked if it expressed her wishes, and nodded assent. She began to sign her name but only managed to get as far as "E. Chal". The paper was then signed by the attesting witnesses. It was held (1) that the testatrix knew and approved the contents of the paper; (2) distinguishing *Re Maddock* (1874), 3 P. & D. 169 (where it was held that a christian name was an insufficient signature by a witness), that the testatrix's signature was sufficient; (3) that the attestation by the witnesses was completed before the testatrix became incapable of understanding what was going on, and therefore the will had been attested in the mental presence of the testatrix as well as in her physical presence.

(Theobald 28, 32.)

Gift to employees—whether apprentices included.—In *Re Marryat* (1948), 64 T. L. R. 125, the testator gave legacies to each employee of a limited company which had taken over a business previously conducted by him. It was held by Jenkins, J., that apprentices who were employed for five years under an apprenticeship deed, and were paid wages by the company, were entitled to share in the bequest.

(Theobald 215.)

Meaning of "armistice".—In *Re Orchard* (1948), 64 T. L. R. 144, the testatrix, by her will made in 1944, gave property to certain persons "in the event of an armistice having been concluded between Great Britain and Germany" before the date of her death. She died in September, 1945, four months after VE-Day. Vaisey, J., consulted the War Office, who replied that in their view no armistice had been concluded between Great Britain and Germany, hostilities having ended with Germany's unconditional surrender. But the learned Judge felt able to hold that this did amount to an armistice within the meaning of the will.

(Theobald 167.)

Legacies of debts.—Testators who bequeath legacies of debts owing to them by their creditors, or owing by a beneficiary to creditors, frequently propound difficult puzzles for the Courts to solve. The difficulty often is that the lay mind sees no difference between "my money in the house" and "my money at the bank". A testator, for instance, has a deposit account amounting to £10,000 at his bank, which constitutes his principal assets; his friends owe him sums amounting to £500; by his will he forgives all debts owing to him: a literal construction of his words involves the odd conclusion that the debt owed by the bank as well as the debts owed by his friends are forgiven, with the result that the testator dies without any estate. In *Re Neville,* [1925] Ch. 44, the testator said "I forgive all debts owing to me". It was held that by saying "forgive" instead of "give" the testator had introduced a personal note and could not have intended to give a legacy of secured debts owed not by his friends but by companies and societies. In *Midland Bank Executor and Trustee Co., Ltd.* v. *Yarners Coffee, Ltd.* (1937), 156 L. T. 274, the testator forgave and released all sums owing to him except such sums as should be secured by mortgages or legal charges. It was held that this did not include a sum of £64,000 on deposit account at his bank, nor large book

debts, but did include a debt of £300 owing by a company of which he was a shareholder. In the recent case of *Re Coghill,* [1948] 1 All E. R. 254, the testatrix exonerated all people from the repayment of moneys owing to her at the time of her death. It was held by Harman, J., that this included personal debts owing by her friends, but did not include secured debts, even though one of these was owed by a personal friend. On the other hand, in *Re Leach* (1948), 64 T. L. R. 175, the testatrix directed her trustees to pay to the creditors of her son A such sums of money as should be owing by him to them at the time of her death. Vaisey, J., held that this included secured as well as unsecured debts, and also that it extinguished all liability under a joint debt owing by A and another person of which A's wife was surety.

A further point arose in *Re Leach.* The testatrix, by codicil, directed her trustees to pay a sum of £1,000 owing by a deceased son B to X. X predeceased the testatrix, but the learned Judge held, following *Stevens* v. *King,* [1904] 2 Ch. 30, that as the legacy to X was given in discharge of a moral obligation, it did not lapse but was payable to X's estate. There is, however, no general principle that a legacy of a debt is an exception to the doctrine of lapse. The circumstances in *Re Leach* were so peculiar that it is a mystery why the case was ever reported.

(Theobald 155, 556–557.)

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4. *FAMILY LAW CASES*

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Divorce—considerations affecting exercise of discretion—bigamous petitioning wife—Redman v. *Redman,* [1948] 1 All E. R. 333.—If we may be forgiven for a possible misquotation from memory, W. S. Gilbert wrote lines to this effect:—

> "In the reign of James the Second
> It was generally reckoned
> As a very serious crime
> To marry two wives at a time."

But not so today: the more complacent attitude towards bigamy, largely a heritage of the war, is perhaps reflected in this decision of the Court of Appeal, though it is an attitude which in general was resisted and deprecated by the Court. Vaisey, J., for example, observed, "I should wish to express my own very strong view that the light way in which bigamy is now too commonly regarded should neither be encouraged nor easily condoned" (at p. 336).

Redman v. *Redman* was an appeal from the refusal of a Commissioner to exercise his discretion in favour of a petitioning wife, who had bigamously married, to grant a decree against her husband on the ground of his adultery with a girl by whom he had had a child. In dismissing the petition the Commissioner had omitted to set out the reasons for his decision. The Court of Appeal held that the mere fact of the Commissioner not having stated every reason for his decision did not imply that he had failed to consider all relevant factors; but the Court was satisfied that all such factors had not been considered, and granted a decree, following *Blunt* v. *Blunt* (1943), 112 L. J. P. 58, and *Osenton* v. *Johnston* (1942), 110 L. J. K. B. 420. On the facts of the case the wife had, through no

fault of her own, been unhappily married and had not heard from her husband for some years when she went through the second marriage ceremony, an episode which was equally unsuccessful. The decision of the Court of Appeal in the wife's favour is important in drawing attention to the importance of the social interest in matters of domestic status, an interest strongly expressed by Lord Simon in *Blunt* v. *Blunt,* dealing with considerations to be taken into account in the exercise of judicial discretion, in these words: " To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, *viz.*, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down ".

(Latey, p. 142.)

Divorce—condonation of adultery—requirement of reinstatement of guilty spouse—Fearn v. *Fearn,* [1948] 1 All E. R. 459—This appeal from a Commissioner's refusal to grant a husband's petition for divorce on the ground of his wife's adultery leading to the birth of an illegitimate child involved the following all too familiar situation: the husband, while serving overseas in the army, heard from his wife that she was expecting an illegitimate child as the result of one isolated act of misconduct. He at once forgave her, but later, on information of his wife's continued association with another man, decided to institute divorce proceedings, and stopped her allowance.

The Court of Appeal agreed unanimously that the husband's original forgiveness did not constitute condonation of the wife's misconduct. For condonation to arise there must be reinstatement of the offending spouse, and at the date of the husband's earlier letters the wife had never been renounced as a wife, as by the stopping of her allowance; and without such renunciation no question of reinstatement could arise. On the question of whether mere words of forgiveness, however strong, could amount to condonation, the Court took the view that, in the absence of agreement between the parties (*Rose* v. *Rose* (1883), 52 L. J. P. 25), words alone were insufficient, adopting the dictum of Lord Chelmsford, L.C., in *Keats* v. *Keats* (1859), 28 L. J. P. & M. 57: " But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete ". From the absolute nature of condonation as a bar, Bucknill, L.J., deduced that the law required more on the part of a husband than a mere intention to waive the offence. On the other hand, the conduct of the innocent spouse after becoming aware of misconduct must not be such as seriously to prejudice the other. If further evidence were required of the social interest in matters coming within the jurisdiction of the Divorce Division, the words of Bucknill, L.J., provide it, when he says (at p. 464), " If one considers what is the interest of the community as to the kind of proof required to establish condonation, it seems to me on the whole that, while it is in the interest of the community that matrimonial bygones should be bygones, it would create great difficulties and injustice if mere words of forgiveness were to be accepted as proof of condonation ".

The husband's appeal was allowed.

(Latey, p. 124.)

Divorce—desertion for less than three years—revival of condoned offence of cruelty—Kafton v. *Kafton,* [1948] 1 All E. R. 435—In this appeal by a husband against the granting of a decree of divorce in favour of his wife the following facts appeared: the wife gave uncorroborated evidence of cruelty between 1931 and 1940, which had been condoned by the resumption of cohabitation until 1943, followed by desertion by the husband for a period of two years preceding the petition. While the Court of Appeal had no difficulty in holding that the acts of cruelty were revived by a period of desertion for less than the statutory three years (following *Beard* v. *Beard* (1945), 114 L. J. P. 33), the chief interest of this decision lies in two further points. In the first place, the Court held that it was not necessary that condonation should always be pleaded, but that failure to plead condonation (as in the present case) did not relieve the Judge of the duty of investigating that question if there was any material indicating the possibility of the existence of condonation. In this matter the Court approved the practice outlined by Hodson, J., in *Lloyd* v. *Lloyd,* [1948] L. J. R. 85, of asking the parties, through their counsel, to bring in all fresh and relevant evidence which might have a bearing on the question of condonation. Secondly, it was affirmed that the requirement of corroboration in allegations of cruelty was a matter of practice, not a rule of law; and that while the normal practice was to require such corroboration, ". . . it has never been decided that the Court is not entitled in a proper case, where it is in no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner" (*per* Tucker, L.J., at p. 437). It remained for Cohen, L.J., to add the caveat that the need for corroboration is necessarily greater in undefended than in defended cases in which conflicting evidence may be weighed and allegations of cruelty tested by cross-examination.

(Latey, p. 128.)

Matrimonial property—husband and wife contributing to purchase of house—importance of intention—Re Rogers' Question, [1948] 1 All E. R. 328.—A question was raised under the Married Women's Property Act, 1882, s. 17, as to the beneficial ownership of a house purchased by husband and wife under the following circumstances: before and in contemplation of marriage the wife found a house, the price of which was £1,000, and entered into negotiations for its purchase. She paid a deposit of £100, the balance being provided by a building society's mortgage. The contract for sale and the mortgage were both in the sole name of the husband, to whom the conveyance was made. Although the wife at first protested against the contract being in the husband's name, her objections were apparently overcome. Mortgage repayments covering a large proportion of the loan had been made entirely by the husband. Roxburgh, J., had held that the husband should hold the house on trust for sale with beneficial interests in the proceeds of nine-tenths for himself and one-tenth for his wife. On appeal, the Court of Appeal affirmed this order subject to a slight variation not affecting the principle.

With the increase in property values, both parties were anxious to claim the entirety of the house, subject to a liability to indemnify the other for what was regarded as a loan. The principle applied by the Court of Appeal, approving that of the Court below, was to ascertain what were, or probably were, the intentions of the parties at the date of purchase of the house; and on this evidence the Court was satisfied that the parties intended to contribute jointly in the proportions in which they did in fact make themselves liable.

Divorce for husband's adultery—variation of wife's covenant in separation deed for weekly payment to husband—judicial discretion—Tomkins v. *Tomkins,* [1948] 1 All E. R. 237.—In a separation deed the wife covenanted to pay to her husband during their joint lives the weekly sum of £5 tax free. On obtaining a decree of divorce on the ground of the husband's adultery, the wife applied for cancellation of the covenant. From the registrar's refusal to vary the deed the wife appealed, and Willmer, J., reversed the order on the ground that the dissolution of the marriage had brought about a fundamental change in the status of the parties, arguing from the analogy of ordinary contracts in which the consideration had wholly failed. The husband appealed; and though the Court of Appeal upheld the order of Willmer, J., it did so on very different reasoning. The Master of the Rolls described the analogy of ordinary contracts as " a misleading one ", for " No question of failure of consideration, no question of anything like frustration, can possibly come into a case under this jurisdiction " (at p. 239). It is, moreover, difficult to see how it could be said that there had been a *total* failure of consideration, since the terms of the separation deed had been observed on both sides for a number of years. The factors which a Court should consider as relevant, in the view of Lord Greene, M.R., were the nature of the settlement, the circumstances in which it was made and the circumstances in relation to which it was executed. It would be improper for a Judge to exclude from his consideration the possibility of a guilty husband being left destitute by the variation of a settlement; and in his remarks on this point the Master of the Rolls gave support to the somewhat negative dictum of his predecessor, Sir George Jessel, who remarked in *Wigney* v. *Wigney* (1882), 51 L. J. P. 60, " Suppose a guilty husband is incapacitated by physical infirmity from earning a livelihood, and has no means of his own, I do not say that no provision can in any case be made for him out of the wife's property ".

The fact that the covenant had been expressed to continue during the joint lives of the parties presented no obstacle to its variation. The Court held that " it had in it necessarily an element of potential change in the sense that it was made under the existing state of the law, which has endured for nearly 100 years, that settlements of this kind are always subject to variation by order of the Court in the event of the marriage being dissolved " (*per* Lord Greene, M.R., at p. 238). In one sense it is difficult to reconcile this statement of a type of implied condition subsequent with the Court's emphatic rejection of contractual analogy and the idea of frustration mentioned above. It would, perhaps, have been both more consistent and convincing to maintain the validity of legitimate and private proprietary arrangements between parties, and to justify variation of them by the Court on the principle of a superior interest of the community in matrimonial arrangements. It is a principle often affirmed in the Divorce Division as a major consideration in the exercise of judicial discretion. For the exercise of that discretion in the instant case it was held that the matter should be treated as at large. " There is a total discretion in the Judge as to the order he shall make which is restricted only by the ordinary principles that govern a judicial discretion. In other words, whatever is relevant he may, and should, take into consideration " (*per* Lord Greene, M.R., at p. 239). Among matters which are irrelevant the Master of the Rolls included the idea that in the variation of a settlement there is some sort of penal jurisdiction against a guilty spouse. It was a consideration of significance that the covenant in the present case formed part of a separation deed and not of an ante-nuptial settlement.

(Latey, Ch. XIII.)

Variation of maintenance order after divorce and re-marriage of both parties—judicial discretion—Bellenden v. *Satterthwaite,* [1948] 1 All E. R. 343.—This case provides an apt illustration of the application of principles of judicial discretion referred to in the previous note. The divorced wife, who had re-married, was appealing against the reduction from £400 to 1s. a year of a maintenance order made on divorce against her former husband, who also had re-married. Exercising the jurisdiction conferred by section 14 (1) and (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which gives a power to vary maintenance orders, Willmer, J., had affirmed the order of a registrar on the ground that re-marriage of the husband had increased his financial liabilities, while the wife's re-marriage had conferred on her a *de jure* right to support and maintenance by her second husband. In supporting this order both Asquith and Evershed, L.JJ., guarded themselves against an admission that they would have made the same order as that appealed from; but refused to interfere with a proper exercise of judicial discretion involving no clear miscarriage of justice. "We are here concerned with a judicial discretion", remarked Asquith, L.J., "and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere".

(Latey, pp. 218–221.)

Securing maintenance order on divorce—death of husband—liability of executors to execute deed for securing payment—Hyde v. *Hyde,* [1948] 1 All E. R. 362.—Pursuant to an order of the Divorce Court for securing £1,200 a year to a successful petitioning wife, the parties' solicitors had agreed to treat as security a block of the husband's shares producing £900 a year, and to a personal covenant covering the balance and binding both the husband and his executors. The husband died before agreeing or executing a draft deed embodying these provisions. On the wife's summons against the executors, Barnard, J., rejected counsel's argument that the Court order created a charge on the husband's assets, distinguishing *Maclurcan* v. *Maclurcan* (1897), 77 L. T. 474, since the order referred to no property until the security was in fact agreed between the parties. However, as in this case there had been agreement as to the shares, Barnard, J., found that, by the joint effect of the order and of the subsequent agreement, the wife had acquired a charge on the specific shares.

Counsel for the executors contended that the Divorce Court had no jurisdiction to entertain the wife's claim for an order for specific execution of the deed. The learned Judge disposed of this argument, not only on the effect of section 43 of the Judicature Act, 1925, but on the ground that "common sense seems to dictate that this Court should make effective its own orders" (at p. 364). An order for the execution of the deed, limited as to the unsecured balance of £300 to assets of the husband in the hands of the executors and applicable for the purpose, was accordingly made.

(Latey, pp. 209ff.)

The standard of proof in allegations of adultery—Ginesi v. *Ginesi,* [1948] 1 All E. R. 373.—The decision of the Divisional Court noted above (p. 147) has now been affirmed, but on different grounds, by the Court of

Appeal. Tucker, L.J., cited with approval the statement of Hodson, J., that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence: in other words "that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact" (*per* Tucker, L.J., at p. 374). One qualification was made by Wrottesley, L.J., who pointed out that the Court was only called upon to determine the standard of proof in cases of adultery, that the authorities themselves all dealt with that particular matrimonial offence and that it should be left to other occasions to decide whether the same principle applied to all kinds of matrimonial offences.

(Latey, p. 349.)

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5. *INCOME TAX*

By Leonard Stein, Barrister-at-Law

Income tax—wife living with husband—wife living in United Kingdom separate from husband—Income Tax Act, 1918, *General Rules, Rule* 16.—The decision of the Court of Appeal in *Nugent-Head* v. *Jacob* (see *The Conveyancer,* December 1946, at p. 127), has been reversed by the House of Lords (1948), T. R. 23. The effect of the decision is that "a married woman living with her husband", within the meaning of the first proviso to Rule 16 of the General Rules of the Income Tax Act, 1918, cannot also be, at the same time, "a married woman living in the United Kingdom separate from her husband" within the meaning of the second proviso to that Rule. It is not surprising to find Rule 16 described by Lord Simon as "a crabbed and involved piece of legislation". In unravelling its mysteries, the House of Lords had to grapple with the forbidding task of making a coherent picture out of the main rule and its two provisos. The main rule is that a married woman is to be assessable to tax as though she were a *feme sole.* This is qualified by the first proviso, which lays it down that a married woman "living with her husband" (such cases being, apparently, treated as exceptional) shall be assessed in the name of the husband. To this is added a further proviso to the effect that a married woman "living in the United Kingdom separate from her husband", who receives an allowance or remittance from abroad, "shall be assessed . . . as a *feme sole,* if entitled thereto in her own right and as the agent of her husband, if she receives the same from or through him or from his property or on his credit". It might seem, at first sight, that, if the expression "living with her husband" and "living . . . separate from her husband" are mutually exclusive, the second proviso is mere surplusage. The case of married women, other than those living with their husbands, has already been dealt with in the main provisions of Rule 16. If, therefore, the class referred to in the second proviso is a class of women not living with their husbands, the second proviso adds nothing to the main rule. This line of reasoning is not strictly correct, since the main rule is concerned only with a married woman's own income and says nothing about her being assessed as agent for her husband in respect of payments received by her "from or through him or from his property or on his credit". But this accounts only for the second limb of the second proviso. It still remains true, as Lord Uthwatt conceded, that, unless there can be a married woman who is "living with her husband" and yet "living in the United Kingdom separate from her husband", the first limb of the second proviso does

nothing. It is indeed, hardly possible to arrive at a completely satisfactory construction of Rule 16, but the House of Lords was unanimous in holding that, once it is established that a wife is living with her husband within the meaning of the first proviso, the second proviso can have no application. It was held, further, that the cases to which the second proviso applies are those in which there has been a rupture of matrimonial relations; where there has been no such rupture, the wife may still be "living with her husband", notwithstanding that they are physically separated, and will be "living with her husband", in spite of such separation, if there is a common marital home. The effect of the decision would seem to be that there are three categories of married women to be considered. Where a married woman is living with her husband, she will be assessable on her own income in his name. Where she is not living with her husband, she will be assessable on her own income as a *feme sole*. Where she is "living in the United Kingdom separate from her husband", she will not only be assessable as a *feme sole* on her own income, but will also be assessable as the agent of her husband on any "allowance or remittance from property out of the United Kingdom" received by her "from or through her husband", even though it is not income to which she is entitled in her own right.

Income tax—tax free annuities bequeathed by will—when provision "made"—Finance Act, 1941, *s.* 25; *Finance (No.* 2) *Act,* 1945, *s.* 20—In *Re Waring, Westminster Bank* v. *Awdry,* [1942] Ch. 309, the Court of Appeal, in construing the provisions of section 25 of the Finance Act, 1941, held that, where a tax free annuity was given by a will, the provision must be taken to have been "made" when the will was executed. It followed that a tax free annuity bequeathed by a will executed in February, 1939, by a testator who died in August, 1940, must be reduced to twenty twenty-ninths of the stated amount, since the provision had been "made" before September 3, 1939. The will in question bequeathed two distinct tax free annuities, but only one of the two annuitants was a party to the appeal, and the Court refused a representative order so as to bind the annuitant who was not a party. Subsequently, the decision of the Court of Appeal was overruled by the House of Lords in *Berkeley* v. *Berkeley,* [1946] A. C. 555, where it was held that, in the case of a testamentary tax free annuity, the provision must be taken to have been "made" when the will took effect at the death of the testator. In these circumstances, the Court was asked, in *Re Waring, Westminster Bank* v. *Burton-Butler,* [1948] 1 All E. R. 257, to determine whether, in the light of *Berkeley* v. *Berkeley,* above, the tax free annuities bequeathed by the will considered in *Re Waring, Westminster Bank* v. *Awdry,* ought to be treated as payable in full, the testator having died after September 3, 1939. This question was answered by Jenkins, J., in the affirmative so far as concerned the annuitant who had not been a party to the proceedings. No representative order having been made, this annuitant was not bound by the judgment of the Court of Appeal and was entitled to the benefit of the decision in *Berkeley* v. *Berkeley.* On the other hand, as regards the annuitant who had been a party to the proceedings, the learned Judge held that the matter was *res judicata* and that the decision was binding upon the annuitant notwithstanding that it had now turned out to have been erroneous. Section 25 of the Finance Act, 1941, was expressed to be applicable so long as the standard rate of tax was 10s., and, on the standard rate being reduced below that figure, was amended by section 20 of the Finance (No. 2) Act, 1945, which made the necessary arithmetical adjustments. On these grounds it was contended that the question ought to be re-opened and considered *de novo.* This contention was rejected by the learned Judge,

who held that the judgment in *Westminster Bank* v. *Awdry,* applied to section 25 of the 1941 Act in its amended no less than in its original form and had once and for all decided the matter adversely to the annuitant.

Income tax—annual payment under settlement—deficiency payments out of capital—Income Tax Act, 1918, *General Rules, Rule* 21. The judgment of Macnaghten, J., in *John Morant Settlement Trustees* v. *C. I. R.* (see *The Conveyancer,* December, 1947, at p. 150) has been affirmed by the Court of Appeal—[1948] T. R. 71.

Surtax—covenant to pay annual sums equivalent to net dividends from company controlled by covenantor — power to revoke or determine — Finance Act, 1938, *s.* 38 (1).—The judgment of Atkinson, J., in *Wolfson* v. *C. I. R.* (see *The Conveyancer,* December, 1947, at p. 149) has been affirmed by the Court of Appeal—[1948] T. R. 175.

Income tax—periodical payments described as loans—whether annual payments subject to deduction of tax—Income Tax Act, 1918, *General Rules, Rule* 21.—The judgment of the Court of Appeal in *C. I. R.* v. *Wesleyan and General Assurance Society* (see *The Conveyancer,* June, 1947, has been affirmed by the House of Lords—[1948] T. R. 67.

Estate duty—accumulations of income under settlement—whether property passed on death of beneficiary—Finance Act, 1894, *s.* 1.—*Att.-Gen.* v. *Eckford's Trustees,* [1948] T. R. 183, provides one more illustration of the principle that there can be no "passing" for estate duty purposes, under section 1 of the Finance Act, 1894, unless, on the death, there was "some actual change in the title or possession of the property as a whole" —*per* Lord Parker in *Att.-Gen.* v. *Milne,* [1914] A. C. 765, at p. 779. In *Eckford's Trustees,* above, this test had to be applied in relation to a somewhat complicated set of facts, which it is unnecessary to set out in detail. The effect of a will made by a testator who died in 1865 domiciled in Jersey, and held to be valid by the law of Jersey, was, briefly, as follows: The residue of the testator's estate, consisting largely of personal estate in England, was to be held upon trust for conversion and the application of the trust moneys in the purchase of a specified landed estate in Scotland. The estate so purchased was to be strictly entailed in conformity with the Scottish law of entail. These trusts, however, were not to be executed until 1956. In the meantime, the trust fund was to be invested in securities and the income accumulated. When the accumulations reached £8,000, they were to be invested in the purchase of land in Scotland. A fresh start was then to be made, and when the accumulations again reached £8,000, they were to be similarly invested, and so on until 1956. The rents and profits of the estates in which the accumulations of income were invested were to go to the person for the time entitled under the entail. Under the Scottish law applicable in such cases, the Scottish Courts had from time to time entertained and granted applications for the payment of

successive accumulations of income, as and when they reached £8,000, to the tenant in tail for the time being in possession. X, a tenant in tail in possession, having died in 1945, estate duty was claimed, under section 1 of the Finance Act, 1894, on the ground that, on the death, there had been a passing of the settled fund. Applying the test laid down in *Att.-Gen.* v. *Milne,* above, Romer, J., held that there was no passing on the death. It was not the case that before the death the person beneficially entitled to the income was X and after the death was X's successor. The position at X's death was that the destination of the income then being accumulated was in suspense and would not be determinable until the accumulations amounted to £8,000. X had nothing more than an expectation of receiving the £8,000 if she was still living when that figure was reached. X's successor had likewise an expectation of receiving the £8,000 if he both survived X and was living when the accumulations amounted to £8,000. The effect of X's death was that the successor's expectation was thereafter subject to one contingency instead of two, but this was no reason for saying that, on the death, there had been a change in the beneficial title to the income. There had, therefore, been no such " actual change in the title or possession of the property as a whole " as would enable it to be treated as passing on the death.

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6. *LANDLORD AND TENANT CASES*

By Lionel A. Blundell, ll.m., Barrister-at-law,
and John T. Plume, Barrister-at-Law.

Rent restrictions—death of tenant—contractual tenancy still subsisting at date of tenant's death—whether member of tenant's " family " residing with him entitled to claim under section 12 *of* 1920 *Act.*—The Court of Appeal has recently considered two cases in which members of a tenant's " family " have claimed the benefit of section 12 of the Rent and Mortgage Interest (Restrictions) Act, 1920, although the tenant held under a contractual tenancy at the date of his death. Section 12 (i) (*g*) as amended by section 1 of the 1935 Act provides: " . . . the expression ' tenant ' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid ".

In *Thynne* v. *Salmon,* [1948] 1 All E. R. 49, the tenant died intestate. A sister, L, who had never lived with him took out letters of administration of his estate. At the time of his death he was the contractual tenant of a dwelling-house living there with another sister, S. A notice to quit was served on L, who did nothing to create a tenancy between herself and S. On expiry of the notice the landlord commenced proceedings against S for possession. S claimed the benefit of section 12 of the 1920 Act. The Court held (Bucknill, L.J., dissenting) that section 12 gave protection to the member of the family of a person who was a statutory tenant at the time of his death, but not where such a person was a contractual tenant at the time of his death and where such contractual tenancy subsequently became vested in personal representatives. It was accordingly held that S could not claim the benefit of section 12.

In *Thynne* v. *Salmon* the Court left open the question as to whether on the death of a contractual tenant a member of his family could claim the benefit of section 12 if no executor or administrator were ever appointed.

This problem was resolved by the Court of Appeal in the case of *Smith* v. *Mather,* [1948] 1 All E. R. 704. The Court held that on the death of a contractual tenant intestate his estate (which, of course, included the tenancy) vested in the President of the Probate Divorce and Admiralty Division pursuant to section 9 of the Administration of Estates Act, 1925. A notice to quit had been served on the President determining the contractual tenancy. The Court, applying *Thynne* v. *Salmon,* held that the son and daughter of the deceased contractual tenant were, in the circumstances, not entitled to succeed to the tenancy under section 12 as the tenancy became vested automatically in the President on the death of the tenant.

(Rent Restrictions Guide, p. 66.)

Notice to quit—no specific date given for expiry—use of general words —construction of tenancy.—An issue of practical importance arose on the construction of a notice to quit in the case of *Addis* v. *Burrows,* [1948] 1 All E. R. 177. The notice gave no specific date for the determination of the tenancy, but was worded as follows: " . . . to quit and deliver up at the expiration of your tenancy which will expire next after the end of one half-year from the service of this notice of the premises . . .", etc. These general words are not quite the same as those usually employed and which have been sanctioned by long usage. The more usual form is that referred to in Woodfall, 24th ed., at p. 973, *viz.*: " . . . at the expiration of the current year of your tenancy which will expire next after the end of one half-year from the date hereof ". It was argued on behalf of the tenant that the form used in the present case did not indicate with sufficient clearness the date upon which the tenant was to quit, that it imposed upon the tenant the obligation to determine a difficult question upon the construction of the tenancy agreement and, further, that such general words would not be used unless as an alternative where a specific date was given in the notice. Upon the first two matters the argument was somewhat fortified by the fact that the tenancy agreement was worded in a most unusual way. It was expressed to be " from January 1, 1944, to June 30, 1945, for the term of one year and so on from year to year until the tenancy be determined at the end of the first or any subsequent year by one of the parties giving to the other of them six calendar months' previous notice in writing ". Reliance was placed on *Phipps (P.) & Co., Ltd.* v. *Rogers,* [1925] 1 K. B. 14, where the notice was worded so as to determine the tenancy " on the earliest date your tenancy can *legally* be terminated ", etc. In that case the Court of Appeal held by a majority that the notice was ineffective as throwing upon the tenant the burden of determining a question of law. In the present case the Court of Appeal held, in the first place, that in order to give effect to the intention of the parties as expressed in the tenancy agreement the term granted was a fixed period from January 1, 1944, until June 30, 1945, and thereafter from year to year. The Court then held that the form of the notice to quit, though departing somewhat from the usual, was valid and effective to determine the tenancy. The tenant was not required to resolve any legal problem as in the case of *Phipps* v. *Rogers* (*supra*), and that case was accordingly distinguishable. The Court did not think that it was essential to name some specific date in the notice, the general words being sufficient in themselves. Evershed, L.J., in the course of his judgment, said that the general form of words as used in this case had been sanctioned by long usage, and were it not for the problem of construction of the tenancy agreement no possible objection could have been taken. The difficulties of construction fell short of those which arose in *Phipps* v. *Rogers,* where the tenant was required to answer questions both of law and fact.

This case to some extent resolves the query on this type of notice raised by the Court of Appeal in the case of *Crate* v. *Miller,* [1947] 2 All E. R. 45; *vide Conveyancer,* vol. 12, p. 153.

(Woodfall, 24th ed., p. 973.)

Forfeiture—relief granted—breach continuing—measure of damages.—In the case of *Duke of Westminster* v. *Swinton,* [1948] 1 All E. R. 248, Denning, J., granted limited relief against forfeiture under section 146 of the Law of Property Act, 1925, without insisting on the immediate remedy of the breach in question. There was a covenant not to use the demised premises otherwise than as a private dwelling-house or to make any structural alterations. The lessee sub-let to A, who in turn sub-let to W. The latter, with full knowledge of the covenant, converted the house into six flats and let them to tenants. The landlord commenced proceedings for forfeiture. Denning, J., ordered the lease to be forfeited so far as concerned W, to whom he refused to grant relief. However, so far as concerned the lessee and A, the learned Judge granted relief and declined to order immediate reinstatement of the premises. He said: "I ought not to impose a condition which would mean the turning out of this house of six families and its restoration as a private dwelling-house and then, quite possibly, the immediate requisitioning and again converting of it into accommodation for five or six families". The learned Judge then went on to say that he proposed to put the landlord in no worse a position than if the premises had been requisitioned (which would probably have been the case if W had not converted them). He, therefore, granted relief to the lessee and A on condition that the premises were reinstated within two years or such further time as the Court might allow. Reference was made to the case of *Eyre* v. *Rea,* [1947] 1 All E. R. 415 (*Conveyancer,* vol. 12, p. 76), in which case Atkinson, J., had refused to grant relief to an assignee of a lease who had committed a similar type of breach as in the present case. In that case Atkinson, J., said that he knew of no case where relief had been given except on the basis of the breach being at once rectified. Denning, J., seemed to pay considerable attention to the practical problems involved in the case, and said that he did not think it was policy to make an order which would have the effect of evicting six families especially as the house would then probably remain vacant on account of its size unless it were requisitioned. Then there was the question of whether the local authority would grant the necessary licence for re-conversion.

On the question of damages, the learned Judge was invited to follow the order in *Eyre* v. *Rea* and award a sum equivalent to the cost of reinstatement to A. He held that the decision in *Eyre* v. *Rea* was a decision on the facts of that particular case, where the proper measure of damage was the cost of reinstatement. In the present case he took into account the fact that A would benefit for a period of two years by receiving the rent from the six occupants of the flats. He awarded the sum of £200 to A, as he thought that sum would cover the amount of damage A had really suffered by the breach.

Trustees for sale—no power to invest in land.—After we had gone to press, Vaisey, J., decided in a reserved judgment in a case not yet reported that trustees for sale of land had no power to invest in land notwithstanding the powers conferred upon them by section 28 of the Law of Property Act, 1925. No transcript of the judgment is available at the time of writing so that it is impossible to give the precise grounds for this decision and the extent to which it may be limited by the powers of management. In fact the decision is an extension of that in *Re Wakeman*, [1945] Ch. 177, but appears to follow logically upon it as was pointed out by the writer of this note in a note in Volume 9, p. 176.

We shall hope to deal more adequately with the point as soon as the judgment is available. In the meantime we would point out that the trusts may provide a power to invest in land and furthermore the absence of such a power *may* be remedied by an application to the Court under the Trustee Act, 1925, s. 57, where a reasonable case can be made out for such an investment.

THE LIBRARY

Current Land Law. By J. R. SMITH-SAVILLE, Solicitor. Estates Gazette, Ltd. 1947. (11s. 6d. net.)

This is a little handbook on current land law and matters connected with it; but at present the Land Law is subject to substantial changes at any moment, and such a work is destined to be partially obsolete before publication. Thus, as the author has pointed out in the preface, the Supplies and Services (Transitional Powers Act, 1947) was passed before the work was issued. Since that date the law concerning agriculture has been very materially changed by the Agriculture Act, 1947, and the observations on Town and Country Planning are now substantially obsolete by reason of the enactment of the Town and Country Planning Act, 1947, a treatise on which would itself occupy perhaps half the space which the whole of the present work occupies. As the work comprises only 149 pages, it will be appreciated that the notes on the various topics with which it deals are very brief. Turning to the section on Death Duties, one misses any reference to the rates of duty which might usefully have been incorporated in relation to recent deaths. The subject of war damage has only three pages.

Again, with regard to requisitioned land, the new Requisitioned Land Act will render the section on that subject obsolete.

So far as it goes, however, this work should be useful. The author himself appreciates the fact that no work of this kind can be relied upon as being up to date under present conditions, and recommends that readers concerned with Statutory Rules and Orders should make application to the Department concerned before deciding upon any action. The book itself, however, contains quite a lot of useful material, and any purchaser of the work will not regret the purchase. This reviewer has already found it useful in practice.

E. O. W.

The Crisis in the Law of Nations. By H. A. SMITH, D.C.L. (Oxon), formerly Professor of International Law in the University of London. London: Stevens & Sons, Ltd. 1947. (7s. 6d. net.)

This is not within our province particularly, but it concerns all men. It is a constructive analysis and we can do no better to show its character than to quote one of the last sentences. "Somehow or other men must be persuaded, if not of the truth of the Christian religion, at least of a Divine order, a natural law, a common standard above the human level by reference to which all human conduct can be judged". All men should read why.

The Modern Law Review. October 1947. London: Stevens & Sons, Ltd. (6s.)

This number contains an article by Mr. F. A. Mann on the Exchange Control Act, 1947. As we find all financial provisions difficult we could have wished that the account was more complete, but to those more concerned than we the explanation of background and the effect of some parts of the Act should be helpful.

PRECEDENTS

Form 1.

Forms of Certificate under the Finance Act, 1947, to be inserted in Conveyances and in Leases where a Premium is paid (*a*).

1. CERTIFICATE to be inserted in a Conveyance on Sale where the consideration or aggregate consideration does not exceed £500 Variation where the consideration or aggregate consideration exceeds £500 but does not exceed £1,500.

It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500 [£1,500].

2. CERTIFICATE to be inserted in a Voluntary Conveyance where the value of the property does not exceed £500 Variation where the value exceeds £500 but does not exceed £1,500.

(*a*) Under s. 52 of the Finance Act, 1947, the stamp duties on conveyances, whether voluntary or on sale, and those payable in respect of premiums on leases are doubled. There are, however, certain exemptions, to obtain the benefit of which it is essential to insert in the deed the appropriate form of certificate. Three cases are to be considered. (1) The old exemption in s. 73 of the Finance Act, 1910, still applies where the consideration, or, if the transaction forms part of a larger transaction or series of transactions, the aggregate consideration, does not exceed £500. The duty in that event is at the old rate of 10s. per cent. (2) Where the consideration or aggregate consideration exceeds £500, but does not exceed £1,500, the new rate of duty is halved, the stamp being accordingly £1 per cent. (3) Where the consideration (not the aggregate consideration) exceeds £1,500 but does not exceed £1,950, the duty is at the rate of £1 per cent., but an additional £2 for every £50 or fractional part of £50 over £1,500 is added, the effect being to "scale up" the rate progressively to the full duty of £2 per cent. payable where the consideration is £1,500 and over. The exemption in cases (2) and (3), it is to be observed, does not apply to premiums on leases where the rent exceeds £20 per annum. This was also the case under s. 15 of the Finance Act, 1911, which still applies to premiums on leases. The old form of certificate is still applicable to (1) and (2), in the latter case with the alteration merely of the figure £500 to £1,500. These forms can also be used in partnership deeds where a premium is paid. In case (3) a new form of certificate is required. This is simply a statement, following the wording of s. 54, to the effect that the transaction does not form part of a larger transaction or of a series of transactions. It is not necessary to refer to the amount of the consideration, which must, under the Stamp Act, 1891, be truly set forth in a conveyance on sale, or to the value of the property in a voluntary conveyance, which will appear from the particulars delivered to the Commissioners for adjudication. The statement can only be used where the conveyance or lease constitutes an isolated transaction, not where it forms part of a series of transactions, even if the aggregate consideration does not exceed £1,950. Thus it may be employed in a conveyance, *e.g.*, of one of several lots purchased at an auction where separate contracts are signed and separate abstracts delivered in regard to each lot; but not in a conveyance of part of one property bought as a whole, or under an option to purchase different lots, even if the purchase money is apportioned for the purpose of the conveyance. To constitute a series of transactions the relationship between them must be integral and not be only fortuitous: *Att.-Gen.* v. *Cohen*, [1937] 1 K. B. 478. Conveyances and leases to charities or trustees holding on charitable trusts are not affected by the new stamp duties provided the stamp is adjudicated, so the certificates in (2) and (3) are not applicable.

It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the property conveyed or transferred exceeds £500 [£1,500].

3. CERTIFICATE to be inserted in a lease at a premium not exceeding £500, or where the aggregate of the premium and the consideration paid under any larger transaction or series of transactions of which the lease forms part does not exceed £500 Variation where the consideration or aggregate consideration exceeds £500 but does not exceed £1,500.

It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration (other than rent) exceeds £500 [£1,500] (*b*).

4. CERTIFICATE to be inserted in a Conveyance on Sale Voluntary Conveyance or lease at a premium where the consideration the value of the property or the premium exceeds £1,500 but does not exceed £1,950.

It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions.

Form 2.

Draft Clause for Lease varying rent with changes in the Interim Index of Retail Prices (details given Ministry of Labour Gazette for June, 1947) (*c*).

Drafted by A. F. Mackeson, B.A., Solicitor.

(1) The Rent hereby reserved shall be the sum of £312 per annum (hereinafter called "the basic rent") and the basic rent shall be paid until the 29th day of September 1948 and thereafter shall be increased or decreased each year in accordance with changes in the cost of living as indicated by the Index of Retail Prices issued by the Authority of His Majesty's Government and at present officially published in the Ministry of Labour Gazette and shall be calculated in the following manner :—

(2) The basic rent shall be taken to correspond with the index figure of 100 at which the new Interim Index of Retail Prices as at the 17th day of June 1947 will start (as announced by the Minister of Labour and National Service in the House of Commons on the 12th day of June 1947)

(3) On the 29th day of September 1948 and the 29th day of September of each succeeding year of the term the rent to be paid for the year then next following shall be the basic

(*b*) This certificate will not be applicable where the rent exceeds £20 per annum.

(*c*) The Lease for which above was drafted commenced at same time as the New Index and therefore the commencing rent could be equated to 100—re-drafting would be necessary if the initial rent was equated to a figure over or below 100, providing for the necessary percentage increase or decrease on such figure.

rent plus or minus a percentage thereon corresponding with the increase or decrease over or below 100 as shown by the Index figure as given in the issue of the Ministry of Labour Gazette or other official publication published immediately last before the 29th day of September each year

(4) If in any year of the said term any other form of Index of Retail Prices shall be introduced by His Majesty's Government to supersede the Interim Index of Retail Prices aforesaid then any new starting Index figure shall be taken to correspond with the rent payable in such year and future rent each year shall be adjusted on the same principle as established by the previous provisions of this Clause and in accordance with percentage variations in any such new Index *mutatis mutandis*.

(5) If there shall be any dispute as to the calculation of the said rent then such dispute or (if His Majesty's Government shall cease to publish any such Index of Retail Prices) then the question of the rent to be paid for the remainder of the term shall be referred to the Arbitration of a single Arbitrator to be appointed in case the parties cannot agree upon one by the President for the time being of the Auctioneers and Estate Agents Institute of the United Kingdom in accordance with the provisions of the Arbitration Acts 1889–1934.

Form 3.

Conveyance on Trust for Sale together with Deed of Declaration of Trust of Premises Intended to be Used Permanently for the Purposes of a Non-charitable Organisation (*a*).

Drafted by Harold Potter, LL.D., Barrister-at-Law.

THIS CONVEYANCE made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Settlor") of the one part and C D of *etc.* and E F of *etc.* (hereinafter called "the Trustees" which expression shall be deemed to include the trustees or trustee for the time being hereof) of the other part Parties.

WHEREAS:— Recitals:

A. The Settlor is the estate owner of a legal estate in fee simple beneficially entitled free from incumbrances of the property intended to be hereby assured. [seisin of settlor];

B. The Settlor is desirous of assuring the said property to the Trustees to be held upon the trusts declared by a deed of even date herewith and executed immediately after this deed and the Trustees have agreed to hold the said property upon the trusts aforesaid. [creation of trust for sale].

(*a*) The purpose of these deeds is to create a trust which though intended to be permanent does not offend the rules against indefinite duration for non-charitable purposes. They are also designed to avoid the question ever arising on the legal title. The Declaration of Trust must be regarded only as a basis and the deletion or addition of clauses (such as clauses regulating investments and meetings, etc., of trustees) will depend upon the precise circumstances in the particular case.

Now in pursuance of the premises THIS DEED WITNESSETH as follows :—

Conveyance. Parcels. Habendum.

(1) The Settlor as Settlor hereby conveys unto the Trustees ALL that the property more particularly described in the [First] Schedule hereto TO HOLD the same unto the Trustees in fee simple [subject to the restrictions particulars of which are set out in the Second Schedule hereto] UPON TRUST that the Trustees shall sell the said property hereby assured at such time or times as they shall think fit with power to postpone such sale in their absolute discretion and the Trustees shall hold such property and the rents and profits thereof until sale and after such sale as aforesaid the proceeds of sale upon the trusts and subject to the powers and provisions concerning the same contained in a deed of even date herewith and made between the same parties.

Trust for sale.

Appointment of new trustee.

2. [The power of appointing new trustees shall be exercisable by the Trustees or trustee for the time being of this Deed] [Where any new trustee or trustees require to be appointed on the death or retirement or removal of any trustee or trustees such trustee shall be appointed by resolution of a general meeting of the —— Society convened in accordance with the rules of the said —— Society and the property hereby conveyed shall be assured to such new trustee or trustees so appointed by the said —— Society as aforesaid by the surviving trustees or trustee or the personal representative or representatives of the last surviving trustee for the time being of this deed but no purchaser shall be concerned to see that any new trustees or trustee to whom the said property has been assured as aforesaid has been appointed by the said —— Society as hereinbefore provided but shall be entitled and bound to assume that such new trustees or trustee have or has been validly appointed.]

IN WITNESS *etc.*

THE [FIRST] SCHEDULE ABOVE REFERRED TO.

Form 4.

Trust Deed to accompany Preceding Precedent.

Parties.

THIS DECLARATION OF TRUST made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Settlor") of the one part and C D of *etc.* and E F of *etc.* (hereinafter called "the Trustees" which expression shall be deemed to include the trustees or trustee for the time being hereof) of the other part.

Recitals:

WHEREAS :—

[conveyance on trust for sale];

A. By a conveyance of even date herewith and made between the same parties the property more particularly described in the Schedule hereto was assured to the Trustees upon trust for sale and to hold the said property and the rents and profits thereof until sale and after sale the proceeds of sale upon the trusts to be declared by a deed of even date therewith meaning this deed.

[agreement to declare trusts].

B. The Trustees have agreed with the Settlor that the said property and the proceeds of sale thereof shall be held upon the trusts together with the powers and provisions hereinafter contained for the

use and benefit of the —— Society (hereinafter called "the Society") in manner hereinafter appearing.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows :— Declaration of trusts.

1. The said property more particularly described in the Schedule hereto shall be held by the Trustees upon trust for sale with power in their absolute discretion to postpone the sale provided nevertheless that no such sale shall be made during the perpetuity period as defined by clause 11 hereof without the consent of the Society as testified by a resolution duly passed at a meeting of the Society convened for the purpose and in accordance with the rules of the Society but no purchaser shall be concerned to see that such consent was obtained. Trust for sale

2. Notwithstanding the discretion to postpone the sale conferred upon the Trustees by clause 1 hereof the Trustees shall sell the said property at any time if they are directed so to do by a resolution duly passed at a meeting of the Society convened for the purpose and in accordance with the rules of the Society. Direction by *cestui que trust* to sell.

3. If and when the said property is sold as aforesaid the proceeds of sale and the investments and interest thereon for the time being representing the same shall be held upon trust for all or any of the general purposes of the Society and so that the whole or any part of such proceeds of sale or investments representing the same may be treated and expended as income accruing to the Society to be used as and for the said general purposes of the Society in accordance with the rules of the Society and the receipt of the Treasurer of the Society for any sum or sums paid to him for the purposes aforesaid shall be a sufficient discharge to the Trustees without inquiry concerning the purposes for which the same sum or sums shall be used or expended. Trusts of proceeds of sale.

4. Until sale the Trustees shall hold the said property upon trust to allow the same or any part thereof and the rents and profits arising out of letting the same or any part thereof to be used for such purposes and for the benefit of such persons as the rules of the Society for the time being in force shall require or in default of such rules as the Trustees shall in their discretion think fit. Trusts until sale.

5. For the purposes of clause 4 hereof the Society may by its rules provide for the appointment of a Committee of Management and such Committee when appointed shall have power to make rules for the management and letting of the said property and in such case the Trustees shall give effect to the directions of such Committee of Management as if the same were contained in the said rules of the Society as aforesaid. Appointment of Committee of Management.

6. No trustee shall be or remain a trustee and no member of the Committee of Management (if any) shall be or remain a member of such Committee unless such trustee or member as aforesaid shall be and remain a member of the Society in accordance with the rules of the Society and such cessation of membership of the Society shall be a ground of unfitness to act in the trusts for the purposes of section 36 of the Trustee Act 1925 but no purchaser shall be concerned to see that any person removed from the trusts hereof in accordance with this clause shall have ceased to be a member of the Society and notwithstanding anything herein contained a purchaser shall be entitled and bound to assume that any trustee who shall not have been removed Trustee to be member of Society.

in accordance with this clause shall be and remain validly a trustee for all or any of the purposes hereof.

Majority of trustees to exercise powers.

7. The number of trustees shall not exceed four but any of the powers vested in the Trustees by this deed or by law may at any time be exercised by a majority of the trustees for the time being without the concurrence or with the merely formal concurrence of any trustee and any trustee who shall dissent from any exercise of any of such powers shall nevertheless concur in executing or signing any document or doing any act necessary for giving effect to the exercise of any of such powers by the majority of the trustees without being responsible for any loss occasioned thereby.

Appointment of new trustee.

[*Add clause 2 from the preceding Precedent.*]

Trustee being member of Committee of Management.

9. Nothing herein shall be construed to prevent a trustee from being or becoming a member of the Committee of Management (if any).

Certificate of Secretary sufficient.

10. Where any act matter or thing can be or is required to be done or made by a majority of persons at a meeting whether of the Society or of the Trustees or of the Committee of Management a certificate under the hand of the Secretary for the time being of the Society concerning such act matter or thing or the meeting whereat it was purported to be done or made shall be conclusive evidence against all persons whomsoever of all matters of fact stated in the certificate.

Definition of perpetuity.

11. The perpetuity period for the purposes of this deed is the period ending at the expiration of 21 years from the death of the last surviving descendant of His late Majesty King George V living at the date of the deed.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

Form 5.

Deed of Security Pursuant to an Order of the Divorce Court Charging the Wife's Maintenance on property Settled by the Husband's Father and on Shares of the Husband, with Power for the Husband to Substitute a Policy for the Shares (*a*).

Parties.

THIS DEED OF SECURITY made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Respondent") of the first part B of *etc.* lately the wife of the respondent (hereinafter called "the Petitioner") of the second part and the C B whose registered office is situate at *etc.* (hereinafter called "the Bank") of the third part

Recitals:

WHEREAS:—

Decree absolute;

(1) A decree nisi for the dissolution of the marriage formerly subsisting between the petitioner and respondent was on the petition of the petitioner pronounced by the Probate Divorce and Admiralty Division (Divorce) of the High Court of Justice on the —— day of —— 19— and the same was made absolute on the —— day of —— 19—

(*a*) Stamp *ad valorem.*

(2) By an Order of the said Court made the —— day of —— 19— it was (*inter alia*) ordered that the respondent should secure to the petitioner for her life as from the date of the said decree absolute the annual sum of £x + y less tax and that in default of agreement between the parties it be referred to conveyancing counsel of the High Court to settle the necessary deed or deeds — Order for maintenance;

(3) Under and by virtue of the will of X (hereinafter called "the Testator") who died on the —— day of —— 19— and whose will and codicils were duly proved on the —— day of —— 19— in the Principal Probate Registry certain stocks funds and property (including in particular the stocks and funds specified in the Schedule hereunder written) now stand settled and are held by the Bank (who is the sole trustee of the said will and codicils) upon the trusts and subject to the powers therein declared and contained during the life of the respondent and from and after his decease upon trust for his child or children as therein mentioned but it was thereby provided that notwithstanding the foregoing trusts the Bank might at any time or times if in its uncontrolled discretion it should think fit so to do (*inter alia*) with the consent of the respondent revoke by deed all or any of the trusts thereinbefore declared and declare any new or other trusts of and concerning the said property or any part thereof — Father's will;

(4) By a deed of revocation made the —— day of —— 19— BETWEEN the Bank of the one part and the respondent of the other part the Bank with the consent of the respondent revoked the trusts and powers by the will and codicil of the testator declared concerning such part of the settled property thereby settled as is now represented by the stocks funds and securities specified in the Schedule hereto so that the same should be forthwith transferred to and vested in the Bank alone to be henceforth held by it as an effectual security for the payment of as well the income fees payable to the Bank and amounting to the sum of £—— and costs and expenses as the annual sum of £—— to the petitioner during her life upon the terms of a security deed already engrossed and intended to bear even date therewith meaning these presents and provided always that the said deed of revocation should by no means extend further than was necessary for the purpose of the said security — Deed of revocation;

(5) The respondent has caused to be transferred to the Bank —— shares of £1 each in —— Ltd. (hereinafter called "the Company Shares") to be held by it for the purposes hereinafter defined concerning the same (and subject to the proviso for substitution hereinafter contained) — Transfer of shares.

(6) In pursuance of the hereinbefore recited Orders these presents have been settled and approved by such conveyancing counsel as a proper deed for giving effect to the said Orders as appears by his signature in the margin hereof.

NOW THESE PRESENTS WITNESS that in pursuance of the said Orders and for the purpose of giving effect to the same it is hereby provided declared and agreed as follows:— — Witnesseth.

1. The Bank shall hold the stocks and funds specified in the Schedule hereto upon trust either to retain the same in their present form of investment or with the consent of the respondent during his life to sell and convert the same or any part thereof into money and — Trusts of settled stocks.

to invest the net moneys thereby arising in any manner authorised by law for the investment of trust money and shall stand possessed of all investments and securities for the time being representing the said stocks and funds upon trust first out of the income arising therefrom to pay the annual income fee due to the Bank for acting in the trusts hereof amounting to the sum of £—— per annum and any costs charges and expenses properly incurred in connection with the trusts hereof and next by means primarily of the said income but if and so far as necessary by resort to the corpus in case at any time income shall be insufficient to pay to the petitioner as from the —— day of —— 19— during her life the yearly sum of £—— less tax the same to be on account of the said annual sum of £—— so ordered to be secured to her as aforesaid and to be payable on the —— day of —— in every year (credit being given by the petitioner for the payments amounting to £—— which have already been made to her on account thereof down to the —— day of —— 19—) and subject as aforesaid shall hold the said funds and the income thereof upon the trusts and subject to the powers upon and subject to which by virtue of the said will and codicils and the said Deed of Revocation the same ought to be held.

Trusts of shares.

2. The Bank shall hold the Company Shares and dividends and income thereof upon trust primarily out of the said dividends and income but if and so far as necessary by resort to the corpus in case at any time the income shall be insufficient to pay to the petitioner as from the said —— day of —— 19— during her life the yearly sum of £—— less tax being the residue of the said annual sum of £x + y so ordered to be secured to her as aforesaid the same to be payable on the like days as hereinbefore provided with reference to the first sum of £x (and credit being given by the petitioner for payments amounting to £—— already made to her on account thereof down to the —— day of —— 19—) and subject as aforesaid shall hold the Company Shares and the dividends and income thereof upon trust for the respondent notwithstanding that in any future year income may prove deficient.

Power to substitute a policy.

3. It is hereby declared and agreed that it shall be lawful for the respondent at any time to substitute for the Company Shares in so far as they shall stand security for payments to become due after the death of the respondent during the residue of the life of the petitioner in case she survive him a policy of assurance with such office in such name or names and upon such terms as shall be approved by the Bank whereby there shall be assured to the petitioner during her life as from the death of the respondent an annual sum of £y less tax in substitution for the like sum charged upon the Company Shares as aforesaid and to be made payable upon the same respective days and upon such policy being duly effected and provision made for the due maintenance thereof to the satisfaction of the Bank the Company Shares shall be released from this security to the respondent or as he shall direct.

IN WITNESS *etc.*

THE SCHEDULE

[*To contain particulars of settled funds.*]

Form 6.

Voluntary Conveyance by a Father to his Son of a Half Share in the Proceeds of Sale of Freehold Property held on Trust for Sale Subject to a Mortgage to a Building Society, together with the Appointment of the Son to be a Trustee of the Property in Place of the Father, who Retires, the Son Covenanting to Discharge the Mortgage and the Building Society Joining to Release the Father from his Liabilities Under the Mortgage (*a*).

Parties.

THIS DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Grantor") of the first part the B Building Society a society incorporated under the Building Societies Act 1874 (hereinafter called "the Society") of the second part C of *etc.* (hereinafter called "the Continuing Trustee") of the third part the Grantor and the Continuing Trustee (hereinafter together called "the Appointors") of the fourth part and D of *etc.* (hereinafter called "the Beneficiary") of the fifth part.

Recitals:

WHEREAS:—

Conveyance on trust for sale;

(1) By a deed of conveyance (hereinafter called "the Conveyance") made the —— day of —— 19— between E of the one part and the Appointors of the third part the freehold property therein described and being Nos. —— —— Street situate in the City of —— were conveyed to the Appointors as joint tenants in fee simple upon trust to sell the same and to stand possessed of the net proceeds of sale upon trust for the Grantor and the Continuing Trustee in equal shares as tenants in common

Mortgage to Building Society;

(2) By a mortgage (hereinafter called "the Mortgage") made the —— day of —— 19— between the Appointors of the one part and the Society of the other part after reciting that the Appointors as members of the Society were entitled to receive £x in respect of —— shares in the books of the Society on the mortgage being executed in consideration of the payment of the sum of £x the Appointors demised unto the Society all the said property comprised in the conveyance for a term of 3000 years to secure payment of the contributions subscriptions interest and other moneys which ought from time to time to be paid by the Appointors in respect of the shares of the Appointors in the Society and according to the rules thereof and the Appointors thereby covenanted with the Society at all times thereafter to make the several payments and to observe and perform the rules of the Society which ought to be paid and observed by the Appointors in respect of the shares which the Appointors then had or might thereafter have in the Society

State of mortgage debt;

(3) The sum of £y is now owing to the Society under the Mortgage

Desire of grantor to transfer share to son;

(4) The Grantor is desirous of making some provision for his son the Beneficiary and has agreed to transfer to him all his half share and interest under the conveyance in the said property and the proceeds of sale thereof subject to the principal moneys and interest remaining due under and secured by the mortgage

Agreement of society to release grantor;

(5) In consideration of the covenant of the Beneficiary hereinafter contained the Society has agreed with the consent of the Continuing

(*a*) Stamp *ad valorem* to be adjudicated.

Trustee to release the Grantor from the obligations imposed on him by the mortgage and upon such release the Grantor shall cease to be a member of the Society in respect of the said shares therein and the Continuing Trustee and the Beneficiary shall be members of the Society in respect of the like number of advanced shares such advanced shares to be treated as having been issued at the date of the mortgage to the Continuing Trustee and the Beneficiary and as having been paid off to the like extent as the shares of the Grantor and Continuing Trustee were paid off immediately before the execution of these presents

Desire of grantor to retire from trusteeship;

(6) The Grantor is desirous of being discharged from the trusts of the conveyance

Desire to appoint beneficiary.

(7) The Appointors are desirous of appointing the Beneficiary to be a trustee of the conveyance in place of the Grantor.

Witnesseth.

NOW THIS DEED WITNESSETH in pursuance of the premises as follows:—

Assignment of share.

1. In consideration of the natural love and affection of the Grantor for his son the Beneficiary and of the covenant by the Beneficiary and the release hereinafter contained the Grantor as settlor HEREBY assigns to the Beneficiary ALL THAT the equal one undivided half share of him the Grantor of or in the proceeds to arise from the sale and the rents and profits until sale of the said property subject to the trusts of the conveyance TO HOLD the same unto the Beneficiary absolutely subject to the principal moneys and interest remaining charged thereon by the mortgage.

Release by society.

2. In consideration of the covenant on the part of the Beneficiary hereinafter contained the Society with the consent of the Continuing Trustee hereby testified and the Continuing Trustee hereby severally release the Grantor from the obligations and covenants contained in the mortgage and on the Grantor's part to be observed and performed PROVIDED ALWAYS that nothing herein contained shall operate to release the Continuing Trustee from any of the obligations assumed by him thereunder.

Covenant by beneficiary to pay mortgage.

3. The Beneficiary hereby covenants with the Grantor and the Society that he will henceforth perform and observe the covenants obligations and stipulations contained in the mortgage and will at all times hereafter duly and punctually pay all moneys which under the mortgage or the rules of the Society for the time being shall become payable at the times and in the manner therein appointed and will in all other respects henceforth observe and perform all the covenants therein contained on the part of the Appointors.

Saving of power of sale.

4. It is hereby declared that nothing herein contained shall prejudice or affect the power of sale conferred by the mortgage.

Appointment.

5. In exercise of the power for this purpose by the statute in that behalf given to the Appointors and of every or any other power enabling them in this behalf they the Appointors hereby appoint the Beneficiary to be a trustee of the Conveyance in the place of the Grantor and to act jointly with the Continuing Trustee for the purposes of the Conveyance or such of the same purposes as are still subsisting and capable of taking effect.

Statement as to value.

6. [It is hereby (*b*) declared and certified that the transaction

(*b*) If the value of the half share assigned does not exceed £500 the form of certificate employed under s. 73 of the Finance (1909–1910) Act, 1910, should be

hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the value of the property or the aggregate value of the property exceeds the sum of £500 [£1500]] [*or* it is hereby (*c*) declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions].

Form 7.

Covenant by Outgoing Partner not to Practise in Competition, for Insertion in Medical Partnership Deed (*a*).

The partners hereby mutually covenant and agree that in consideration of the agreement for partnership hereinbefore contained a partner who retires or is expelled under the provisions for that purpose hereinbefore contained shall not for a period of — years from the date of his retirement or expulsion within a radius of — miles from the partnership consulting-room or surgery at such date (or in case there shall not then be any such consulting-room or surgery from the then residence of the [other partner] [then senior partner])—

(a) whether alone or in partnership with any other person or persons [or as assistant to any person or persons] engage in the practice of a general medical practitioner or any branch of medicine surgery or midwifery usually performed by a general medical practitioner

(b) prescribe or perform any specialised treatment in medicine surgery or midwifery directly for or on the request of any patient who is not introduced to him by another medical practitioner

(c) be concerned or interested whether directly or indirectly and whether financially or otherwise in any competing professional business carried on within the area aforesaid PROVIDED that the covenant

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inserted: see s. 54 (6) of the Finance Act, 1947, and the rate payable will be only 10s. per cent. If the value exceeds £500 but does not exceed £1,500 the same form of certificate must be used with the substitution of the sum of £1,500 for £500 in order to reduce the rate of duty from £2 per cent. to £1 per cent.

(*c*) Where the value exceeds £1,500 but is under £1,950 this form of certificate should be used. In this case it is to be observed that the reduced rate is only obtained if the transaction does not form part of a larger transaction or of a series of transactions: see s. 54 (3) (a) Finance Act, 1947.

(*a*) Covenants against competition *per se* are invalid. The covenant must be restricted to the general scope of the profession of the covenantor, though it need not be confined to the particular branches of such profession which he has actually engaged in at the date of the covenant. As regards medical practitioners, the judgments of the Court of Appeal in the recent case of *Routh* v. *Jones*, [1947] 1 All E. R. 758, show that the members of a firm of general practitioners are entitled to take a covenant which extends somewhat beyond what is commonly regarded as included in the ordinary "g.p.'s" practice. As Cohen, L.J., pointed out, there is a "fringe extending beyond the walls of general medical practice" which is reasonably required for the protection of the partnership, though the onus is on the covenantee to prove its necessity.

Lord Greene, M.R., thought that the carrying on of a specialised practice where the patient could go to the specialist direct and not through another medical man could be included. In reliance on this *dictum*, the above form has been made somewhat wider than that on p. 362 of volume 11 (which may still be used, though it is perhaps safer in view of the above judgments in the Court of Appeal to make it clear that practice as a consultant is not prohibited) but the additional covenant has been made distinct so as in any case to be severable. It is submitted that the covenant is saved by the proviso to s. 35 (6) of the National Health Service Act, 1946. The consideration for such a covenant is not the sale of goodwill but the agreement for partnership: *Leighton* v. *Wales*, 3 M. & W. 545.

aforesaid shall not prevent the retiring or expelled partner from practising as a consultant physician or surgeon within the period and area aforesaid or from practising or performing services under any scheme for providing a general medical service for the public established under the National Health Service Act 1946 or any statutory modification or re-enactment thereof for the time being in force or any rules or regulations thereunder [if so directed under or pursuant to any such scheme] within such period and area.

Form 8.

Underlease of Suite of Offices to Partners; Qualified Covenants by Landlord to Repair Outside and by Tenants to Repair Inside (*a*).

Parties. THIS LEASE made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Landlord " which expression shall where the context so admits include the estate owner or estate owners for the time being of the reversion of the premises hereby demised immediately expectant on the term hereby granted) of the one part and B of *etc.* and C of *etc.* carrying on business in partnership under the name or style of —— (hereinafter called " the Tenants " which expression shall where the context so admits include their executors administrators and assigns) of the other part

Demise. WITNESSETH that in consideration of the rent hereinafter reserved and of the covenants on the part of the Tenants and the conditions and agreements hereinafter reserved and contained

Parcels. The Landlord hereby demises unto the Tenant ALL THOSE — rooms situate and being on the rear of the — floor of the building known as No. — —— Street —— in the County of —— more particularly delineated on the plan hereto annexed and thereon coloured pink TOGETHER WITH free ingress and egress for the Tenants and all persons authorised by them in common with the Landlords and all other persons having the like right in over and along the entrance passages stairways and lifts in the building known as No. — —— Street aforesaid (hereinafter called " the said Building ") to the said — rooms during ordinary business hours TOGETHER ALSO with the right in common with the Landlords and all other persons having the like right to use the water closet and lavatory on the said —— floor of the said building TOGETHER ALSO with all easements rights and privileges appurtenant or hitherto used or enjoyed (whether or not as of right) with the demised premises EXCEPT AND RESERVING unto the Landlord and the superior landlords and the Tenants or occupiers of the parts of the said building not hereby demised the free passage and running of water and soil and other matter (whether for trade or domestic purposes) through the drains and pipes and the free passage of gas and electricity through the pipes meters and wires now laid through or upon the demised premises and the right to inspect repair and amend the same and to lay such further or other drains pipes and wires

(*a*) Care should be taken to see that the tenants' covenants correspond with those in the head lease.

as the landlords may deem necessary or expedient EXCEPT AND RESERVING also to the Landlord and the superior landlords of the said building the right to rebuild or alter the elevation or otherwise of the adjoining or neighbouring buildings notwithstanding that the access of light and air to the demised premises may thereby be diminished and the right to alter the interior construction or arrangement of the said building notwithstanding that the access to the demised premises may be thereby rendered less commodious SUBJECT to all easements rights and privileges hitherto used or enjoyed (whether or not as of right) by the owners or occupiers of the parts of the said building not hereby demised or of any adjoining property over or in relation to the demised premises

Habendum. TO HOLD all the premises unto the Tenants as joint tenants upon the trusts hereinafter declared concerning the same for the term of —— years from the —— day of —— next determinable as hereinafter provided

Reddendum. YIELDING AND PAYING therefor during the said term the yearly rent of £x in respect of the demised premises by equal quarterly payments on the usual quarter days the first payment [being an apportioned sum] to be made on the —— day of —— next AND ALSO YIELDING AND PAYING by way of additional rent a sum or sums equal to the due proportion (to be determined in case of dispute by the Landlords' surveyor or agent) from time to time attributable to the demised premises of the rates and taxes (including water rate) payable in respect of the said building Such sum to be payable in manner and on the days hereinbefore appointed for payment of the rent of £x AND ALSO a sum or sums equal to the amount which the Landlord may expend in insuring and keeping insured the said building against loss or damage by fire as hereinafter provided such sum or sums to be paid on the quarterly day hereinbefore appointed for the payment of the said rent of £x next after the expenditure thereof.

Trust for sale. 2. It is hereby agreed and declared that the Tenants shall stand possessed of the demised premises UPON TRUST to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of sale and the net rents and profits until sale (after payment of outgoings) upon the trusts and with and subject to the powers and provisions applicable thereto as part of their partnership property and that during the life of the survivor of the Tenants (meaning the Tenants personally) and of the issue now living of his late Majesty King George V and twenty-one years after the death of such survivor and pending the sale thereof the Tenants or other the trustees for sale of the demised premises shall by way of extension of the powers conferred on trustees for sale by statute have the same full and unrestricted power of dealing with the same or any part thereof as if they were the absolute owners thereof.

Tenants' covenants: 3. The Tenants do hereby jointly and severally covenant with the Landlord in manner following :—

to pay rents; (1) To pay the several rents hereinbefore reserved at the times and in manner hereinbefore provided clear of all deductions whatsoever

to repair and paint inside; (2) At all times during the said term to keep the interior of the demised premises (including the partition walls [sky-lights] windows and window-sashes) and the Landlords' fixtures and fittings in good

and tenantable repair (damage by fire act of God and inevitable accident excepted) and in particular once in every seven years of the term and in the last year thereof (whether determined by effluxion of time or by notice by either party under the provision in that behalf hereinafter contained) to paint with two coats of enamel paper with suitable quality paper [grain] varnish whitewash and colour all the inside parts of the demised premises usually painted [grained] varnished whitewashed and coloured and which the Tenants are hereby required to keep in repair PROVIDED that if and so far and for such period during the said term as the Tenants shall be unable to obtain the labour materials and licences necessary to enable them to repair and decorate the demised premises in accordance with this covenant (which they shall at their own expense use their best endeavours to obtain) they shall *pro tanto* be released from the performance of the same

(3) At the expiration or sooner determination of the said term quietly to yield up the demised premises and the Landlords' fixtures and fittings (including keys) in the same good and tenantable repair (but subject to the same proviso) in which they are hereinbefore required to keep the same

to permit landlord to enter and view;

(4) That the Landlord and the superior landlords and all persons authorised by him or them may enter upon the demised premises or any part thereof at all reasonable times and inspect the condition thereof and of all defects decays or wants of reparation then and there found and which the Tenants shall be liable to make good under the covenants hereinbefore contained to give or leave notice on the demised premises AND that the Tenants will within the space of two calendar months after such notice repair and amend the same according to such notice and covenants

to remedy defects;

(5) That if the Tenants shall make default in complying with any such notice as aforesaid or in the performance of any of the covenants for or relating to repair or decoration hereinbefore contained it shall be lawful for the Landlord and the superior landlords (but without prejudice to the right of re-entry hereinafter contained) to enter upon the demised premises and execute the requisite repairs decorations and works at the expense of the Tenants in accordance with the covenants and provisions herein contained and the Tenants shall on demand repay to the Landlord the expenses of such repairs decorations and works

not to alter;

(6) Not without the written consent of the Landlord to make any alterations or additions to the demised premises or the construction lay-out or arrangement or the external decoration thereof or to cut or injure any of the outside or inside walls floors joists chimney pieces pipes or wires

not to use outside for advertisement;

(7) Not to exhibit or permit to be exhibited any signs or advertisements or to display any name or lettering on the outside walls of or the entrance to the demised premises but this covenant shall not operate to prevent the Tenants exhibiting the name of their firm on the notice board in such entrance [and on the doors of the rooms occupied by them]

(8) That the Landlord and the superior landlords and all persons authorised by him or them may enter upon the demised premises or any part thereof at all reasonable times for the purpose of executing any necessary repairs or alterations or other works to the parts of the said building not hereby demised — to permit landlord to enter to do repairs to other parts;

(9) Not to use or occupy the demised premises or permit the same to be used or occupied otherwise than as offices nor for dwelling or sleeping in or for any other purpose or in any manner inconsistent with such use or occupation — to use as offices only;

(10) Not to do or permit or suffer to be done on the demised premises any act or thing which in the opinion of the Landlord may be or grow to be a nuisance annoyance or damage to the Landlord or the Tenants of the parts of the said building not hereby demised or the adjoining or neighbouring owners or occupiers or which may be a breach of any stipulation or condition in the superior leases of the said building — not to commit nuisance;

(11) To pay for all gas and electricity consumed by the Tenants on the demised premises as shown by the respective meters and to observe all regulations and requirements of the gas and electricity companies or authorities and to keep the landlords effectually indemnified against any non-payment breach non-performance or non-observance of the same respectively — to pay for gas, etc.;

(12) Not to use or permit the demised premises to be used for the purpose of holding an auction — not to hold auctions;

(13) Not to do or suffer to be done on the demised premises anything which may render any increased or extra premium payable for the insurance of the said building against fire or which may render any policy covering the same void or voidable — not to avoid insurance policy;

(14) To pay to the Landlord all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Landlord of and incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or any statutory modification or re-enactment thereof for the time being in force notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court — to pay costs of notice of breach of covenant;

(15) Not to assign underlet or part with the possession of the demised premises or any part thereof without the consent in writing of the Landlord such consent not to be unreasonably refused PROVIDED that this covenant shall not extend to an assignment to a new partner or partners in the said partnership carried on by the Tenants (whether alone or jointly with the Tenants or either of them) or to the survivor of the Tenants or any such new partners. — not to assign or underlet;

4. The Landlord doth hereby covenant with the Tenants in manner following:— — landlord's covenants:

(1) To pay all existing and future rates (including water rate) taxes charges assessments impositions and outgoings whatsoever whether parliamentary parochial local or of any other description for the time being payable in respect of the said building (except such charges for gas and electricity as the Tenants hereinbefore covenant to pay) — to pay rates and taxes;

(2) If and so far as the necessary materials labour and licences shall be available and procurable at all times during the said term to — to repair outside;

keep the main walls timbers roof floors drains and exterior (excluding the [sky-lights] windows and window-sashes in or over the demised premises) of the said building and the cisterns water pipes and fire prevention apparatus therein and the entrance passages stairways lifts water closet lavatory and drains which the Tenants shall from time to time have the right to use under this lease in good structural repair and in good order and condition and properly lighted

to insure buildings;

(3) To adequately insure the said building against fire and in case of damage or destruction by fire to reinstate or rebuild the same as the case may be And if the demised premises or any part thereof shall be destroyed or so damaged by fire or otherwise (except through the act or default of the Tenants) as to be unfit for use or occupation as offices for one calendar month after such damage or destruction the several rents hereby reserved or a fair and just proportion thereof according to the extent of the injury sustained shall as from the expiration of such month cease and be suspended until the demised premises shall be rebuilt or reinstated

to perform covenants in head-lease;

(4) To pay the rent reserved by and (subject to the express provisions hereof) to perform and observe the covenants conditions and agreements in the superior leases of the said building so far as the same affect the parts thereof not hereby demised

Not to permit nuisances;

(5) Not to do or permit or suffer to be done on the parts of the said building not hereby demised anything which may be or grow to be a nuisance annoyance or damage to the Tenants and if and when requested in writing by the Tenants and upon being sufficiently indemnified by the Tenants against all expenses and costs to permit his name to be used in any necessary actions or proceedings against the Tenants or occupiers of the parts of the said building not hereby demised in respect of such acts as aforesaid

to provide porter;

(6) So far as circumstances permit to pay and keep a competent commissionaire and lift attendant during ordinary office hours and a competent caretaker or watchman at all other times in and for the protection of the said building but so that the Landlord shall not be liable for the neglect or dishonesty of any person so employed by him

for quiet enjoyment.

(7) That the Tenants paying the several rents hereby reserved and observing and performing the covenants conditions and agreements herein contained and on their part to be performed and observed may peaceably and quietly hold and enjoy the demised premises without any interruption or disturbance by the Landlord or any person claiming under or in trust for him.

Proviso for re-entry.

5. Provided always and this lease is upon the express condition that if the several rents hereby reserved or any of them or any part thereof respectively shall at any time be in arrear and unpaid for fourteen days or upwards (whether the same shall have been legally demanded or not) or if the Tenants shall at any time fail or neglect to observe or perform any of the covenants conditions and agreements herein contained and on the part of the Tenants to be performed and observed or if the Tenants shall become bankrupt or make any arrangement or composition with their creditors or permit any execution to be levied on the demised premises or if the assigns of the Tenants being a company shall enter into liquidation whether voluntary or compulsory (not being a voluntary liquidation for the purpose of amalgamation

or reconstruction) then and in such event the Landlord may re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the term hereby created shall cease and determine without prejudice to the rights and remedies of the Landlord in respect of any antecedent breach of the covenants conditions and agreements on the part of the Tenants herein contained.

Power for either party to determine lease.

6. PROVIDED also and it is hereby agreed that if either the Tenants or the Landlord shall be desirous of determining this lease at the expiration of the first —— years of the term hereby granted and of such desire shall give —— calendar months' notice in writing (of which service in accordance with the provisions of section 196 of the Law of Property Act 1925 shall be sufficient) to the other of them and in the case of the Tenants shall pay all the several rents and perform and observe all the covenants conditions and agreements hereinbefore reserved and on their part to be said performed and observed up to such determination then and in such case immediately after the expiration of the first —— years of the said term this present lease and everything herein contained shall cease and be void without prejudice to any claim right or remedy by either party against the other in respect of any antecedent breach of any covenant condition or agreement herein contained.

IN WITNESS *etc.*

Form 9

TOWN AND COUNTRY PLANNING ACT, 1947

Contracts made prior to the Appointed Day where Development Value likely to be important (*a*)

I

Clauses in the Contract

(a) *Where the right to development value is assigned* :—

(i) The property is sold for the existing use as a [single private dwelling-house (*b*) OR single grocer's shop OR allotments OR AS THE CASE MAY BE] together with all rights or claims of and in the development value in respect of restricted user under the Town and Country Planning Act, 1947

(*a*) In the absence of regulations it is difficult to decide what rights should be assigned or steps taken, but see the Memo. printed *ante*, p. 85: we have only attempted to provide interim forms where the contract is entered into prior to the Appointed Day (probably April 1, 1948) but we hope to provide others in the next number.

It seems pretty clear that these forms need only be used where the land is fairly near to development or has workable minerals (other than coal). Ordinary agricultural land or land already fairly developed are little likely to share in the "global sum" for compensation for "restricted value" since loss must be not less than £20 per acre nor less than one tenth of the restricted value: see section 63 (1). The right to claim vests as a "personal right" in the legal owner on the Appointed Day: section 64 (1): and is assignable as "personal property": section 64 (2).

(*b*) To turn a single dwelling-house into flats is "development" apparently carrying a development charge: houses suitable for conversion ought to share in the global sum; at any rate it needs to be defined.

(ii) If the sale is not completed before the Appointed Day as defined by the said Act the Vendor will assign all the said rights and claims to the said development value and will covenant with the Purchaser to take all such steps at the request and cost of the Purchaser as may be requisite or necessary to make or support any such right or claim.

(b) *Where the right to development value is retained* :—

(i) The property is sold for the existing use as a [AS THE CASE MAY BE] but except and reserving unto the Vendor all rights or claims of and in the development value in respect of restricted user under the Town and Country Planning Act, 1947

(ii) If the sale is completed prior to the Appointed Day as defined by the said Act the Purchaser will at the request and cost of the Vendor enter into a declaration of trust of the development value and a covenant to assign at such request and cost as aforesaid all the said rights and claims to the said development value and to do any act matter or thing at such request and cost as aforesaid as may be requisite or necessary to make or support any such rights or claims in respect of such development value.

II

Clauses in Conveyance after the Appointed Day where the Development Value passes to the Purchaser (*c*)

Recital. AND WHEREAS in the said agreement [for sale of the said property] it was agreed that the Vendor would assign all rights and claims whatsoever of and in the development value payable under or by virtue of the Town and Country Planning Act 1947 in respect of the said property and would enter into a covenant in respect thereof in manner hereinafter appearing

Testatum. AND THIS DEED FURTHER WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the Vendor as beneficial owner hereby assigns unto the Purchaser ALL THAT the right title or claim or rights titles or claims whatsoever of and in such sum or sums of money payable and all stock or stocks issued in respect of the development value of the said property under or by virtue of the Town and Country Planning Act 1947 or any Act for the time being replacing the same TO HOLD the same unto the Purchaser absolutely AND the Vendor for himself his executors and administrators hereby covenants with the Purchaser and his successors in title that he the Vendor will at all times at the request and cost of the Purchaser make any application or applications or take or join in taking any proceedings or do any act matter or thing (including the execution of transfers of any such stock as may be issued) such as may be requisite or necessary to make substantiate or enforce such right or claim as aforesaid.

(*c*) The assignment and covenant could be contained in a separate instrument but in view of the length of time (a matter of years) before the claims will be determined it is probably more convenient to combine the assignment in the conveyance. It should, however, be clearly separated from the remainder of the conveyance since the right is a "personal right" and assignable as "personal property"; notice must be given to the Central Land Board of the assignment: section 64 (2).

III

A

Clauses in Conveyance before the Appointed Day and Separate Covenant where the Development Value is Retained by the Vendor (*d*)

AND WHEREAS the said agreement [for sale] excepts and reserves to the Vendor the development value payable in respect of restricted user under or by virtue of the Town and Country Planning Act 1947. Recital.

AND THIS DEED FURTHER WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the Purchaser will at all times hereafter if and so soon as the same shall become vested in him hold all right or claim whatsoever to development value in respect of the said property and all money or sums of money payable and all stock issued in respect thereof under or by virtue of the Town and Country Planning Act 1947 UPON TRUST for the Vendor absolutely [AND COVENANT TO ASSIGN AS IN PRECEDENT B IF DESIRED]. Testatum.

B

Declaration of Trust and Covenant by the Purchaser in favour of the Vendor

THIS DECLARATION OF TRUST made the —— day of —— 1948 BETWEEN A B of *etc.* (hereinafter called the Purchaser) of the one part and C D of *etc.* (hereinafter called the Vendor) of the other part.

WHEREAS :—

(i) By an agreement for sale of the property more particularly described in the Schedule hereto it was agreed between the parties hereto that the development value of the said property under or by virtue of the Town and Country Planning Act 1947 should be excepted and reserved to the Vendor and that the Purchaser would enter into a Declaration of Trust and Covenant hereinafter appearing

(ii) The said agreement was completed on this day and immediately before the execution of this Deed.

Now in pursuance of the said agreement and in consideration of the completion of the said contract THIS DEED WITNESSETH as follows :—

1. The Purchaser hereby declares that if and so soon as the same becomes vested in him he the Purchaser will hold all right or claim whatsoever to development value in respect of the property more particularly described in the Schedule hereto and all money or sums of money payable and all stock issued in respect thereof under or by virtue of the Town and Country Planning Act 1947 UPON TRUST for the Vendor absolutely.

2. The Purchaser for himself and his successors hereby covenants with the Vendor his executors and administrators that he the Purchaser will so soon after the Appointed Day as defined by the Town and

(*d*) The best method of dealing with this case is difficult to determine. As personal property the right could be dealt with independently of the title altogether by a Declaration of trust and covenant as in head B, which is also convenient as the document is retained by the Vendor. On the other hand as development value may "hang about" for a long time a reference to the matter in the conveyance may be convenient. In any event it cannot be assigned, because it is only an expectancy and the trust is incompletely constituted until it falls into possession.

Country Planning Act 1947 as the Vendor shall require and at the cost of the Vendor duly assign to the Vendor ALL THAT the right or claim to such sum or sums as may be determined to be payable in respect of the said development value under or by virtue of the said Act or any Act for the time being replacing the same and to all or any stock issued in respect thereof and will thereafter at all times at the request and cost of the Vendor make any application or applications or take or join in taking any proceedings or do any act matter or thing requisite or necessary to make or substantiate or otherwise enforce such right or claim as aforesaid.

IN WITNESS *etc.*

The Schedule above referred to.

IV

Registered Land

A

Contract (*e*)

B

Transfer (*f*)

Where the Purchaser takes an assignment after the Appointed Day a clause to be added to the existing clauses in the transfer :—

1. I the said [VENDOR] as Beneficial Owner hereby assign unto the said [PURCHASER] All that the right title or claim or rights titles or claims whatsoever to or in respect of development value in respect of the land comprised in the title above referred to and all money or sums of money payable and all stock or stocks issued in respect thereof under or by virtue of the Town and Country Planning Act 1947 or any Act for the time being replacing the same for an absolute interest AND I the said [VENDOR] for myself and executors and administrators hereby covenant with the said [PURCHASER] and his successors in title that I the said [VENDOR] will at all times hereafter at the request and cost of the said [PURCHASER] make any application or applications or take or join in taking any proceedings or do any act matter or thing (including the execution of transfers of any such stock as aforesaid) such as may be requisite or necessary to make substantiate or enforce such right title or claim as aforesaid.

(*e*) The system of registered conveyancing is ill designed to meet with these "casual" rights since its purpose is to make title as simple as possible. The contract, however, is not affected and should follow the form under Head I above.

(*f*) There seems to be no doubt that grave objection lies to incorporation in the transfer of references to development value retained by the Vendor where the transfer is made before the Appointed Day since it would constitute a trust. Hence the only appropriate method is form III B above. On the other hand assignments of the development value after the Appointed Day would seem most appropriately to be dealt with by a separate clause in transfer.

AGRICULTURE ACT, 1947 (*a*)

I

Clause in Contract concerning Agricultural Unit

(a) No part of the property contracted to be sold forms part of an agricultural unit for the purposes of the Agriculture Act 1947 the whole of which is not included in the property hereby contracted to be sold

(b) The plots coloured green on the accompanying plan form part of an agricultural unit for the purposes of the Agriculture Act 1947 the whole of which is not included in the property hereby contracted to be sold but the consent of the Minister of Agriculture has been obtained to the sale and will be handed over on completion.

II

Clauses in Conveyance concerning Agricultural Unit

A

Where the property only includes the whole of an agricultural unit or agricultural units :—

AND WHEREAS the said property comprises [a single] [OR two OR MORE AS THE CASE MAY BE] agricultural unit[s] as defined by the Agriculture Act 1947 and does not include part only of any agricultural unit. Recital.

TO HOLD the same unto the Purchaser in fee simple as [a single] [OR two] agricultural unit[s] as defined by the Agriculture Act 1947 (*b*) and so that no part of the land hereby conveyed forms part of an agricultural unit as aforesaid not hereby conveyed. Habendum

B

Where part of the land is part only of an agricultural unit :—

AND WHEREAS the land coloured green on the said plan forms part of an agricultural unit as defined by the Agriculture Act 1947 the whole of which unit does not form part of the land hereby conveyed but the consent of the Minister of Agriculture has been obtained to the inclusion of the said land in this conveyance (*c*). Recital.

(*a*) If agricultural land is sold except as an agricultural unit or complete agricultural units, any part of an agricultural unit so sold can be acquired compulsorily by the Minister of Agriculture within 3 years unless he consented to the sale: s. 86; see Notebook, *ante*, p. 81. As this may obviously be a serious matter for a purchaser these clauses are designed to ensure that it does not happen or, if it does that the Purchaser knows what is happening or the Vendor is liable at least in damages.

(*b*) The purpose of drafting the Habendum in this form is to get the benefit of the covenants for title. It is thought that so conveyed a vendor would be liable in damages for any loss suffered by a purchaser should the Minister of Agriculture exercise his power of compulsory purchase. It is difficult to see how land forming part of another agricultural unit could be interpreted to fall within this Habendum.

(*c*) This recital gives effect to clause (b) in the contract above. Its inclusion in the conveyance is not necessary but it may be convenient (i) to show the creation of a new agricultural unit; (ii) to remind the purchaser and any subsequent grantee to obtain the consent.

Habendum. TO HOLD the same unto the Purchaser in fee simple and so that the said land coloured green on the said plan shall from henceforth form part of [the single] agricultural unit hereby conveyed (*d*).

III

Registered Land (*e*)

A

Contract

[SEE CLAUSES IN I WHICH APPEAR TO BE EQUALLY APPLICABLE.]

B

Where the land is a complete agricultural unit the ordinary form of transfer must be employed but where the transfer is not intended to include part of an agricultural unit the benefit of the covenants for title may be obtained by drafting the transfer as follows

I A B of *etc.* as Beneficial Owner hereby transfer to C D of *etc.* the land [shown and edged with red on the accompanying plan and more particularly described in the Schedule hereto] comprised in the title above referred to being [a single] OR [two OR MORE] agricultural unit[s] as defined by the Agriculture Act 1947 and so that no part of the land forms part of an agricultural unit as aforesaid not hereby transferred.

Where the land includes part of an agricultural unit Form as above down to :—

Land comprised in the title above referred to so that the whole of the land hereby transferred shall from henceforth form a single agricultural unit as defined by the Agriculture Act 1947.

Form 10

Deed of Covenant for Payment of a Weekly Sum for Seven Years Determinable on Assignment. Variations for Payment of Tax-free Sum (*a*).

Parties. THIS DEED OF COVENANT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Covenantor") of the one part and B of *etc.* (hereinafter called "the Beneficiary") of the other part.

(*d*) This Habendum may have the effect of getting the benefit of covenants for title and will have the effect of establishing the agricultural unit for the future. If there are two or more agricultural units, then the Habendum would be better framed: "And so that the said land coloured green on the said plan shall from henceforth form part of a single agricultural unit as aforesaid together with the land coloured brown on the said plan".

(*e*) The operation of this Act on registered land is indirect and the machinery for protecting purchasers is obscure as normal methods do not fit into the scheme of registered conveyancing.

(*a*) This covenant is effective to enable the covenantor to deduct the annuity from his taxable income for income tax and surtax purposes, notwithstanding the possibility of determination of the annuity within seven years: *Inland Revenue Commissioners* v. *Black*, [1940] 4 All E. R. 445.

WITNESSETH as follows :—

Covenant to pay.

1. The Covenantor hereby covenants with the Beneficiary that he the Covenantor will for the period of seven years from the date hereof or the joint lives of the Covenantor and the Beneficiary whichever shall be the shorter period pay to the Beneficiary for his absolute use and benefit (subject nevertheless to determination in the events hereinafter mentioned) the weekly sum of £—— [such a weekly sum as after deducting income tax thereon at the standard rate for the time being in force shall amount to a net sum of £——] out of his general fund of taxed income such sum to commence from the date hereof and to accrue from day to day and to be paid on Saturday in each week the first payment (being an apportioned sum) to be paid on the Saturday next after the date hereof.

Proviso for determination.

2. The weekly payments hereinbefore covenanted to be paid shall not be assignable and shall cease to be payable if the Beneficiary shall assign or charge the same or any part thereof or shall do or suffer any act or thing whereby whether by operation of law or otherwise the said weekly payments shall or would but for this provision become wholly or in part vested in payable to or charged in favour of any other person or corporation [or if the Beneficiary shall neglect to perform any of the covenants on his part hereinafter contained after being required to do so in writing].

Covenant to repay proportion of reliefs.

[3. (1) The Beneficiary hereby covenants with the Covenantor that he the Beneficiary will repay to the Covenantor such a portion of any income tax recoverable by the Beneficiary in each year by way of exemptions personal allowances and reliefs (but not including reliefs allowances or rebates by the Statutes and Rules for the time being in force attributable to particular items of income) as shall bear the same proportion to the entirety of the tax so recoverable by the Beneficiary as the gross amount of the aggregate of the weekly payments hereinbefore covenanted to be paid in such year bears to his total taxable income for that year AND THAT the Beneficiary will sign all claims forms and other documents necessary for ascertaining and obtaining payment of any income tax recoverable by him (*b*)

(2) For the purposes of this clause the income tax recoverable by the Beneficiary shall be deemed to accrue from day to day during the financial year in respect of which it is recoverable and be apportionable accordingly

(3) The covenant for repayment to the Covenantor hereinbefore contained shall take effect in substitution for any implied trust in favour of the Covenantor of the due proportion of any income tax recoverable and of his statutory rights in relation thereto].

IN WITNESS *etc.*

(*b*) This covenant will not affect the right of the beneficiary to repayment: *Inland Revenue Commissioners* v. *Cook*, [1946] A. C. 1.

Form 11

Mortgage by a Father of a Policy on the Life of his Son by way of Collateral Security for an advance to the Son on Mortgage of a Life Interest and Policy.

Parties. THIS MORTGAGE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Father) of the first part B of *etc.* (hereinafter called the Son) of the second part and C of *etc.* (hereinafter called the Lender) of the third part.

Recitals; WHEREAS :—

Mortgage. (1) This Deed is supplemental to a mortgage (hereinafter called the Principal Deed) dated *etc.* and made between the Son of the one part and the Lender of the other part being a mortgage of the life interest of the Son in the investments and property subject to a settlement dated *etc.* and a policy of assurance for the sum of £—— effected on the life of the Son in the —— Assurance Society being a mortgage for securing payment to the Lender of the principal sum of £—— with interest thereon at the rate of £5 per cent. per annum payable half-yearly on the —— day of —— and the —— day of —— reducible on payment within thirty days to the rate of £4 per cent. per annum

Sum due; (2) The said principal sum of £—— remains owing on the security of the Principal Deed together with the current half year's interest thereon

Agreement for further security; (3) Upon the treaty for the advance of the said principal sum of £—— it was agreed that the payment thereof with interest should be further secured in manner hereinafter appearing

Title to policy; (4) The Father is entitled to the policy of assurance payable on the death of the Son hereinafter mentioned

Agreement by son to concur. (5) The Son has agreed to join in this Deed in manner hereinafter appearing.

Now in pursuance of the said agreement and in consideration of the premises THIS DEED WITNESSETH as follows :—

Assignment of policy. 1. The Father as BENEFICIAL OWNER hereby assigns to the Lender ALL THAT policy of assurance effected in the —— Assurance Society in the name of the Father payable on the death of the Son numbered —— for the sum of £—— and under the annual premium of £—— and the said sum of £—— assured thereby and all bonuses additions and moneys to become payable under the same policy and the full benefit thereof TO HOLD unto the Lender subject to the proviso for redemption hereinafter contained.

Proviso for redemption. 2. It is hereby provided that on payment on the —— day of —— next by the Father to the Lender of the principal sum of £—— with interest thereon in the meantime at the rate of £—— per cent. per annum payable and reducible as provided by the Principal Deed the premises hereinbefore assigned shall at the request and cost of the Father be duly reassigned by an endorsed receipt or otherwise to the Father.

Father not to be personally liable. 3. The Father shall not be personally liable for payment of the principal money or interest for the time being hereby secured.

Primary security to be mortgage. 4. As between the Son and the premises comprised in the Principal Deed on the one hand and the Father and the premises hereinbefore

assigned on the other hand the Son and the said premises comprised in the Principal Deed shall be primarily liable for the payment to the Lender of the said principal sum of £—— and interest thereby secured but this provision shall not affect the rights and remedies of the Lender or the enforcement thereof in such order and manner as the Lender shall think fit.

Power of sale.

5. The statutory power of sale shall become immediately exercisable by the Lender without the necessity of giving any notice in that behalf to the Father or the Son at any time or times after the power of sale applicable to the Principal Deed shall have become exercisable and any sale under such power of any policy for the time being subject to this security may be made by way of surrender to the issuing office.

Charge of lender's expenses.

6. All costs charges and expenses properly incurred under this Deed or under the Principal Deed and all moneys properly paid by the Lender shall together with interest thereon at the rate of £—— per cent. per annum be charged on the premises for the time being subject to this security and be deemed to be added to the principal moneys thereby secured for the time being and shall bear interest and be payable accordingly.

Covenants as to upkeep of policy, etc.

7.—(1) Each of them the Father and the Son so far as regards the acts or defaults of himself his executors or administrators but not further or otherwise hereby covenants with the Lender that the policy of assurance hereinbefore assigned is not void or voidable and that the same policy or any new policy to be effected under the provisions hereinafter contained shall not become void or voidable and that neither the Father nor the Son will do or suffer anything whereby the Lender may be prevented from receiving the moneys to become payable under any such policy

(2) The Son hereby covenants with the Lender (i) that if the policy hereinbefore assigned or any new policy to be effected as aforesaid has or shall become voidable he will forthwith at his own cost do all things necessary for restoring or keeping the same on foot And that if any such policy has or shall become void he will forthwith at his own cost effect and deliver to the Lender or do all things necessary to enable the Lender to effect a new policy or policies in the name of the Lender maturing on the death of the Son in such office and subject to such provisions as the Lender shall think fit for such sum or sums (excluding profits) not exceeding in the aggregate such sum as would have become payable under the void policy if the Son had died on the day when such policy became or shall become void (ii) that the Son will during the continuance of this security duly pay all premiums and other moneys (if any) necessary for keeping on foot the policy hereinbefore assigned and every such new policy as aforesaid within seven days after the same shall become payable and will forthwith deliver or procure to be delivered the receipt for every such payment to the Lender And that if he shall at any time neglect or refuse to make the payments aforesaid or to deliver or procure to be delivered to the Lender such receipts as aforesaid the Lender may pay the same (iii) that the Son will before he goes beyond the limits of [the policy hereinbefore assigned or any] new policy give notice in writing to the Lender of his intention so to do

(3) It is hereby agreed and declared as follows (i) All moneys

costs charges and expenses paid or incurred by the Lender for the purposes mentioned in this clause or any of them shall be deemed to be properly incurred by him (ii) If the Son shall at any time during the continuance of this security go beyond the limits of any policy for the time being subject to this security or subject his life to any extraordinary risk not covered by any such policy or if the Lender shall receive notice as hereinbefore provided of the Son's intention to go beyond such limits or subject his life to such risk or shall have other reasonable grounds for believing that the Son is intending so to do then the Lender may without any further consent on the part of the Son or the Father pay any extra premiums payable on such policy for covering any increased risk or may surrender by way of exchange or otherwise for valuable consideration any such policy and may accept in exchange or otherwise effect any other policy on the life of the Son in such office or offices and for such sum or sums and at such premiums generally subject to such provisions (including provisions allowing the Son to travel by land sea or air and with or without restriction as to mode or limits and to reside either during his life or for any other period in any part of the world and upon any other terms providing for any other contingency or extraordinary risk for which the Lender may deem it expedient to provide) as the Lender may think expedient and may deal with such policy in the same manner as if the Lender had been absolutely entitled thereto.

IN WITNESS *etc.*

Form 12

Power to invest fixed sum in Purchase of a Residence for use in Marriage Settlements of Personalty or Land held on Trust for Sale (*a*)

(1) The Trustees shall upon a direction in that behalf being given in manner hereinafter provided raise any sum not exceeding £—— and apply the same in the purchase (including the costs of and incidental to the purchase) alteration and repair (whether structural or otherwise) making of improvements in decoration and furnishing of a

(*a*) The recent decision in *Re Power, Public Trustee* v. *Hastings*, [1947] 1 Ch. 572, shows the desirability of inserting an express power to purchase a residence for the husband or wife in personalty settlements whenever the occasion for doing so is likely to arise. In modern conditions when either of them may have to change their place of residence and obtain accommodation near their place of work such a power is almost always desirable or at least merits consideration. Though the principle of *Re Power, supra*, may not be of general application, trustees would certainly be unwise in assuming that the common forms of investment clause, even if they include power to purchase land, authorise the purchase of a residence. *Re Wakeman, National Provincial Bank* v. *Wakeman*, [1945] Ch. 171, also raises a question whether trustees for sale holding upon an express trust for sale or the statutory trusts are entitled to invest in the purchase of land, and *à fortiori* of a residence under the statutory power conferred on them by s. 28 of the Law of Property Act, 1925.

The grounds of the decision in *Re Power, supra, viz.*, that the purchase of a residence may not constitute an "investment" because the trustees may be induced by the special needs of the beneficiaries to pay too much for the advantage of vacant possession and the situation of the property, indicates that it may be desirable to relieve the trustees from the responsibility of selecting the residence and to confer an absolute right to do so on the husband and wife, though this of course may enure to the prejudice of the reversionary interests under the settlement. Such a power may perhaps also be useful in a realty settlement, though it is submitted that the principle of *Re Power* would not apply to a strict settlement. A form is given in the next Precedent.

messuage and appurtenances together with suitable gardens and land to be held therewith situate in England or Wales or Northern Ireland and being freehold or leasehold held for any term of years such messuage and premises to be held as a residence for the husband the wife and the issue of the said intended marriage or any one or more of such persons but so that none of the persons aforesaid shall acquire any absolute right to the possession or occupation of the said premises but shall reside therein only by the permission of the Trustees and upon such terms as to payment of outgoings and otherwise as the Trustees in their absolute and uncontrolled discretion shall think fit to impose (*b*)

(2) If the amount so applied as aforesaid shall not in the first instance amount to the said sum of £—— the Trustees may at any time or times and if required by a direction in manner hereinafter provided shall purchase any further land or property adjoining or suitable to be held with the premises already purchased or necessary for the preservation of the amenities thereof but so that the aggregate sum applied under this present power shall not at any one time exceed the said sum of £——

(3) A direction to purchase premises under this present power shall be in writing signed by the husband and wife jointly during their joint lives or by the survivor of them during his or her life and may specify the particular premises to be purchased and whether the money is to be raised wholly out of the husband's fund or the wife's fund or in any and if so what proportions out of both but in default of any direction in this respect the Trustees may in their absolute and uncontrolled discretion determine out of what fund or funds and in what proportions the money shall be raised

(4) The Trustees shall be bound to give effect to any such direction as aforesaid and shall not be chargeable with breach of trust by reason only of the price paid or the value of the premises or the title shown thereto or generally as to the propriety thereof as an investment nor shall the husband or the wife be liable for giving any such direction

(5) The premises so purchased shall be conveyed or assigned to the Trustees UPON TRUST with the consent in writing of the husband and the wife during their joint lives or of the survivor during his or her life and after the death of such survivor at the discretion of the Trustees to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of any such sale (after payment of costs) upon the like trusts and with and subject to the like powers and provisions (including this present power) upon and subject to which the money so laid out in the purchase of the said premises would have been subject if it had not been so laid out PROVIDED nevertheless that the Trustees if they shall see special reason for so doing may in their absolute and uncontrolled discretion sell the said premises or any part thereof with the consent only of one of them the husband and the wife (*c*)

(*b*) The beneficiaries must not be given a right to possession which could be held to override the trust for sale and create a settlement for the purposes of the Settled Land Act, 1925. See *Re Hanson, Hanson* v. *Eastwood*, [1928] Ch. 96.

(*c*) The power should authorise the creation of an express trust for sale. See *Re Hanson, supra*. The power to sell with the consent of one of the spouses is to provide against the possibility of the spouses quarrelling and one of them refusing consent to a sale of premises purchased out of the other's trust fund.

(6) (i) If any premises purchased under this present power shall be of leasehold tenure having less than [60] years to run the Trustees may if they think fit effect or purchase a sinking fund policy or policies for securing a sum or sums equal to the purchase price of the premises and the costs of and incidental to the purchase and any anticipated liability for repairs

(ii) The Trustees shall pay the premiums required for effecting and maintaining any such sinking fund policy or policies out of the income of the fund or proportionately out of the income of the funds out of which the premises were purchased and shall pay the purchase money of any such policy purchased by them in like manner out of the capital of the same fund or funds and shall retain the same policies until the money secured shall become payable or the premises shall be sold

(iii) The monies secured by and received in respect of any such policy as aforesaid or the proceeds of sale thereof if the premises in respect of which the same is taken out or purchased shall be sold UPON the like trusts and with and subject to the like powers and provisions (including this present power) as the money laid out in the purchase of the premises and policy so purchased would have been held if the same had not been so laid out (*d*).

Form 13

Power to invest fixed sum in Purchase of Residence for use in Strict Settlement of land

(1) Capital money arising under the Settled Land Act 1925 or money deemed to be or to represent capital money arising thereunder may by way of extension of the modes of investment authorised by that Act be applied in the purchase alteration and repair (whether structural or otherwise) making of improvements in (whether authorised by the said Act or not) decoration and furnishing of a messuage and appurtenances together with suitable gardens and land to be held therewith situate in England or Wales or Northern Ireland and being freehold or leasehold held for any term of years as a residence for the tenant for life for the time being in possession of the settled land and his or her spouse and issue (if any)

(2) The amount so applied shall not exceed the sum of £—— but if in the first instance a sum less than the sum of £—— shall be so applied any further land or property adjoining or suitable to be held with the premises already purchased or necessary for preserving the amenities thereof may at any time or times be purchased but so that the aggregate amount applied under this present power shall not at any one time exceed the said sum of £——

(3) In addition to any statutory protection to which they may be entitled the Trustees shall not be liable by reason of the price paid or the value of any premises purchased as aforesaid or the title shown thereto or generally as to the propriety thereof as an investment of

(*d*) If there is a general power to invest in land provision will probably already have been made for effecting sinking fund policies. If desired power may be given to effect a policy at a single premium payable out of capital.

capital money nor shall the tenant for life be under any liability to the other parties entitled under the settlement for giving a direction to the Trustees to invest in the purchase of any such premises

(4) The said sum of £—— or any part thereof may be raised by mortgage of the settled land as though the same were required for one of the purposes mentioned in section seventy-one of the Settled Land Act 1925 and accordingly the mortgagee shall not be concerned to see that such money is wanted or otherwise as to the application thereof

(5) If any premises purchased under this present power shall be of leasehold tenure having less than [60] years to run a sinking fund policy shall if the trustees so require be effected in the names of the trustees for securing a sum equal to the purchase price of the premises and the costs of and incidental to such purchase and any anticipated liability for repairs and the premiums required for effecting and maintaining any such policy shall be paid out of the income of the settled property and such policies shall be retained until the money secured shall become payable or the premises shall be sold and the money received in respect of any such policy or the proceeds of sale thereof if the premises in respect of which the same is taken out shall be sold shall be held as capital money arising under the Settled Land Act 1925.

Form 14

Conveyance of Freeholds by a Surviving Partner who has Appointed a New Trustee to act with him, subject to Restrictive Covenants (*a*)

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter collectively referred to as the Vendors) of the one part and C of *etc.* (hereinafter called the Purchaser) of the other part. Parties.

WHEREAS :—

(1) By a Conveyance dated *etc.* and made between X of the one part and the said A and Y of the other part the property hereinafter described was conveyed to the said A and Y in fee simple subject to the stipulations contained in a Conveyance dated *etc.* and made between *etc.* UPON TRUST to sell the same with power to postpone sale and to stand possessed of the net proceeds of sale and the net rents and profits until sale upon the trusts and with and subject to the powers and provisions applicable thereto as part of the partnership property of the firm of A and Y Recitals: conveyance to partners;

(*a*) This Precedent assumes that the property has been conveyed to the partners on trust for sale and to hold the proceeds on trust for the partners as part of their partnership property; but even if no express trust has been declared, the property will be held on the statutory trusts, and the sale should be carried out in a similar way; the Precedent can be readily adapted to such a case. It is preferable for the appointment of a new trustee to act with the surviving partner (which is essential to enable him to give a good receipt for the purchase money as trustee) to be made by a separate deed. The surviving partner is a trustee for sale of the assets for the purpose of winding up the partnership, and could only sell as beneficial owner by bringing the partnership affairs on to the title and proving that the deceased partner's estate had received all that he was entitled to under the Articles.

death of one partner; (2) The said Y died on the —— day of —— 19—

appointment of new trustee; (3) By an appointment dated the —— day of —— 19— and made between the said A of the 1st part the said B of the 2nd part and the Vendors of the 3rd part the said B was appointed to be a trustee of the recited Conveyance dated *etc.* in the place of the said Y deceased

agreement for sale. (4) The Vendors have agreed with the Purchaser for the sale to him of the estate in fee simple in the said property subject to the said stipulations but otherwise free from incumbrances at the price of £z.

Now this Deed witnesseth as follows :—

Conveyance (1) In pursuance of the said agreement and in consideration of the sum of £z on or before the execution of these presents paid by the Purchaser to the Vendors as such trustees as aforesaid (the receipt and payment of which sum the Vendors hereby acknowledge) the Vendors as trustees hereby convey unto the Purchaser all that *etc.*

Habendum. to hold unto the Purchaser in fee simple free from all the trusts powers and provisions affecting the proceeds of sale but subject to the observance of the said stipulations in the said Conveyance dated *etc.* so far as the same are subsisting and capable of being enforced

Covenant to observe stipulations. (2) The Purchaser hereby covenants with the Vendors (but by way of indemnity only) that the Purchaser or the persons deriving title under him will as from the date hereof observe the said stipulations [a copy whereof is for reference set out in the Schedule hereto] and will keep the Vendors and each of them and their respective estates and effects effectually indemnified against all proceedings costs claims and demands arising from the breach of the said stipulations or any of them.

[(3) *Acknowledgment for production of documents*]

[(4) *Appropriate certificate as to value under Finance (1909–10) Act 1910 or the Finance Act 1947.*]

In witness *etc.*

[*The Schedule above referred to*]

[This will contain a copy of the stipulations if for any reason there is likely to be any difficulty in obtaining production of the Deed creating them.]

Form 15

Appointment by Surviving Partner of New Trustee of Parnership Land (*a*)

Parties. This Appointment is made the —— day of —— 19— between A of *etc.* (hereinafter called the Present Trustee) of the 1st part B of *etc.* (hereinafter called the New Trustee) of the 2nd part and the Present Trustee and the New Trustee of the 3rd part.

Recitals: Whereas :—

(*a*) The trusts on which the proceeds of sale are to be held depend upon the terms of the partnership articles or the arrangements between the partners as to winding up. There appears to be no necessity for a separate appointment in regard to the proceeds of sale. Such an appointment is not essential for the protection of the partner's interests, and it is submitted that, having regard to s. 24 of the Law of Property Act, 1925, a purchaser is not concerned to see that any such appointment has been made. A memorandum of the new trustees for sale should be indorsed on the conveyance to the partners.

(1) This Appointment is supplemental to a Conveyance (hereinafter called the Conveyance) dated *etc.* and made between X of the one part and the Present Trustee and Y of the other part whereby certain freehold property situate at —— in the County of —— was conveyed to the Present Trustee and the said Y (subject to the stipulations contained in a Conveyance dated *etc.* and made between *etc.*) UPON TRUST to sell the same with power to postpone sale and to stand possessed of the net proceeds of sale and the net rents and profits until sale upon the trusts and with and subject to the powers and provisions applicable thereto as part of the partnership property of the firm of the Present Trustee and the said Y — conveyance on trust for sale;

(2) The said Y died on the —— day of —— 19— — death of Y;

(3) The Present Trustee is desirous of appointing the New Trustee to be a trustee of the Conveyance in the place of the said Y deceased. — desire to appoint.

NOW THIS DEED WITNESSETH as follows :—

1. In exercise of the power in that behalf conferred by the Trustee Act 1925 and of every and any other power him hereunto enabling the Present Trustee hereby appoints the New Trustee to be a trustee of the Conveyance in the place of the said Y deceased and to act jointly with him the Present Trustee for the purposes of the Conveyance or such of the same as are subsisting and capable of taking effect. — Appointment of new trustee.

2. The parties hereto hereby declare that it is their intention that the statutory vesting declaration shall be implied herein under section forty of the Trustee Act 1925. — Vesting declaration

IN WITNESS *etc.*

Form 16

Deed by a Father, who has Divorced the Mother of his Infant Children, Appointing his Brother and his Brother's Wife to be their Guardians During his Absence Abroad, with Provisions Allowing the Mother to have Access to them (*a*).

THIS DEED is made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Father") of the first part B of *etc.* (hereinafter called "the Mother") of the second part C D of *etc.* and E D the wife of the said C D of the third part — Parties.

WHEREAS the marriage formerly subsisting between the Father and Mother was dissolved on the petition of the Father by a decree absolute of the Probate Divorce and Admiralty Division (Divorce) of the High Court of Justice dated the —— day of —— and the custody of the children of the said marriage was given to the Father — Recitals: divorce;

AND WHEREAS there are three children of the said marriage and — children;

(*a*) Where a parent going abroad leaves young children in the custody of some relation or friend, delegating to him the powers of a guardian, frequently such *de facto* guardian wants to have some document to show his authority to act on the father's behalf. Strictly no formal document is necessary. However, where the children's parents have been divorced and their custody has been given to the parent going abroad, it is desirable to have some document stating the position and to obtain the consent of the other parent to it, so as to avoid dispute with regard to the children's custody immediately the parent to whom the right of custody had been given goes abroad.

no more namely H A, I A and J A (hereinafter called " the Children ") now aged —, —, and — respectively

absence of father;

And whereas the Father is about to leave England for a period of approximately —— years in order to take up employment at —— and it will not be possible for him to make a home for the children in England and he does not think it would be in their best interests for them to live with him at —— and he has accordingly requested his brother the said C D and his brother's wife the said E D to undertake the care and custody of his children during his absence abroad and to provide a home for them during their school holidays which they have respectively agreed to do

agreement of mother.

And whereas the Mother has agreed to the said C D and E D having the care and custody of the children upon the terms that she has such rights of access to them as is hereinafter contained.

Now this Deed witnesseth in pursuance of the premises as follows :—

Appointment of guardians.

1. The Father with the consent of the Mother (testified by her execution of these presents) hereby appoints C D and E D jointly and each of them severally to act during his absence abroad as guardians or guardian of the children and to exercise all his parental rights over their persons and in particular to have the sole custody and care of the children and to manage and superintend their education and maintenance.

Covenants of father.

2. The Father hereby covenants with the said C D and E D as follows :—

(1) To pay to them the sum of £—— a week in respect of each child for any period while such child is living with and maintained by them during the school holidays or any other period or periods

(2) To pay the expenses of the Children's education including all school fees and the medical and dental expenses incurred in respect of the Children or any of them

(3) At all times hereafter to keep indemnified the said C D and E D and their respective executors and administrators from all debts and liabilities contracted or incurred by the said C D and E D or either of them in respect of the education and maintenance of the Children or otherwise incurred in respect of their upbringing.

Access of mother.

3. The Mother shall at all convenient and reasonable times have access to and communication with the Children while living with the said C D and E D and shall be entitled to have the Children to stay with her for a period not exceeding one week in each school holiday she paying their travelling expenses and the expenses of their maintenance while they are with her.

In witness *etc.*

Form 17

Agreement for sale of a House to the Tenant, the Vendor reserving the right to repurchase the House, or be paid any profit made by the Purchaser on a resale (*a*).

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Vendor) of the one part and B of *etc.* (hereinafter called the Purchaser) of the other part WHEREBY it is agreed as follows :— Parties.

1. The Vendor shall sell and the Purchaser shall purchase for the sum of £—— and upon the terms and conditions hereinafter contained ALL THAT piece or parcel of land situate in the Parish of —— in the County of —— containing —— acres and bounded *etc.* Agreement for sale.

TOGETHER WITH the messuage or tenement and appurtenances erected thereon or on part thereof and known as —— subject to a Lease dated *etc.* and made between the Vendor of the one part and the Purchaser of the other part under which Lease the Purchaser is now in occupation thereof TOGETHER ALSO (if the purchase shall not be completed prior to the Appointed Day for the coming into force of the Town and Country Planning Act 1947) of the benefit of any compensation under that Act which may be payable to the vendor.

2. The Purchaser having paid to Messrs —— the Vendor's Solicitors as Stakeholders the sum of £—— part of the purchase money as a deposit on the execution of this agreement shall pay the balance of the said purchase money to the Vendor or as he shall direct on the —— day of —— 19— at the office of the Vendor's said Solicitors at which time and place the purchase shall be completed. Completion.

3. The Vendor is selling as [beneficial owner]. Capacity in which vendor sells.

4. The title shall commence with a Conveyance on sale dated *etc.* and made between *etc.* Commencement of title.

[5. The Purchaser shall pay interest on the balance of the purchase Purchaser to pay interest on purchase money as from contract.

(*a*) The object of this Precedent is to prevent the Tenant making a profit by buying the property cheaply by reason of his being a protected tenant under the Rent Restriction Acts, and reselling it with vacant possession at a greatly enhanced price. The value of property available for occupation nowadays is, as is well known, grossly inflated.

It may be argued that, generally speaking, such a resale does not concern the Vendor, but this is not so where the property is sold at a low figure, or even at all, to the sitting tenant on compassionate grounds, or because of his relationship to the Vendor. In such cases the Precedent may be of use to prevent the Vendor's generosity being taken advantage of. A representation by the tenant that he is not intending to resell, but to occupy the premises himself, would require to be very specific in order to afford a ground for rescission of the contract for misrepresentation, as appears from the recent decision of Jenkins, J., in *Wragg* v. *Lovett* (unreported). In any case such a misrepresentation would not be a ground for rescission if the property were resold after completion. A covenant by the Purchaser not to let the house may be inserted if desired; but it would be difficult to enforce; and anyhow it is perhaps unreasonable for the landlord to expect to get back more than he sold and himself to have the advantage of a vacant property.

The right of pre-emption must be registered as a land charge of Class C (iv).

The right of pre-emption apparently does not create an interest in land and need not be limited to a period of twenty-one years to avoid a perpetuity—see *Manchester Ship Canal Co.* v. *Manchester Racecourse, Ltd.*, [1901] 2 Ch. 57; but there can be no advantage in extending it beyond twenty-one years.

money and discharge all outgoings payable in respect of the property and shall be entitled to the rents and profits as from the date hereof] (*b*).

Law Society's conditions to apply.

6. The property is sold subject to the Law Society's Conditions of Sale (1934 edition) so far as they are not varied by or inconsistent with the provisions of this agreement and are applicable to a sale by private treaty.

Option to vendor to repurchase.

7. If at any time within the period of —— years from the date hereof the Purchaser shall be desirous of selling the property hereby agreed to be sold the Vendor shall have the right to repurchase the same on the terms and conditions following that is to say:—

(1) The Purchaser shall give notice in writing of his desire to the Vendor and shall offer the said property to the Vendor at a price equal to the purchase money of £—— payable therefor under this present agreement together with an additional sum equal to the value of the capital improvements (if any) made thereon by the Purchaser since the date of completion of this agreement

(2) The Vendor shall within one month of the receipt of such notice give notice in writing to the Purchaser of his intention to repurchase the said property and thereupon a contract for the sale and purchase of the same and the fee simple thereof free from incumbrances (together with the benefit of any compensation payable under the Town and Country Planning Act 1947) at the price aforesaid shall be concluded between the Purchaser and the Vendor

(3) The title to be deduced by the Purchaser shall commence with the Conveyance to him by the Vendor made pursuant to this present Agreement and the Vendor shall pay to the Purchaser a deposit of 10 per cent. of the purchase money and the then current edition of the Law Society's Conditions of Sale shall apply so far as applicable to a sale by private treaty

(4) If the Vendor shall not within the said period of one month signify his intention to purchase the said property as aforesaid (as to which time shall be of the essence) or if he shall at any time within such period in writing signify his irrevocable intention not to purchase the same the Purchaser shall be at liberty to sell the said property to any other person as he shall desire

(5) The purchase shall be completed on the expiration of six weeks from the date of the notice by the Vendor to accept the Purchaser's offer to sell or from the award of the arbitrator or arbitrators under the provision for arbitration hereinafter contained as to the value of any capital improvements whichever shall be the later date

[(6) The Purchaser shall not during the said period of —— years lease or agree to lease or part with the possession of the property or any part thereof but nothing herein contained shall be deemed to prevent him from mortgaging or charging the same by demise or otherwise]

(*b*) Where the rent payable is less than the interest on the purchase money it will be in the Vendor's interest to insist on this clause. The effect is the same as would be implied under an open contract for sale to the tenant, under which the Lease would continue in law, but the rent in equity would in effect cease to be payable. Usually, however, the Law Society's conditions under which the Vendor will take the rent under the Lease and discharge the outgoings until the date of completion, may be left to govern the position.

(7) The Vendor may at his option in lieu of accepting the offer of the Purchaser to sell the property to him by one month's notice in writing require the Purchaser to pay to him [one half of] the amount (if any) whereby the purchase money payable to the Purchaser under the proposed sale by him (less the value of any capital improvements made thereon by the Purchaser after the date of completion of the present agreement) exceeds the said purchase money of £—— under this present agreement and such sum shall be paid by the Purchaser to the Vendor forthwith on the completion of the proposed sale by the Purchaser (*c*)

(8) The provisions of section 196 of the Law of Property Act 1925 shall apply to any notices to be given by the Vendor or the Purchaser

(9) Any question which may arise as to the value to be attributed to any capital improvements in the property or what improvements are to be deemed capital improvements shall in default of agreement between the parties be referred to the arbitration of two indifferent persons one to be appointed by each party to the reference or their umpire. And this shall be deemed to be a submission to arbitration within the Arbitration Acts 1887–1934.

Provision as to requisitioning.

8.—(1) In the event of the possession or use of the property [or any part thereof] being taken on behalf of His Majesty under emergency powers as defined by the Compensation (Defence) Act 1939 prior to actual completion of the sale the Vendor shall forthwith inform the Purchaser thereof and the Purchaser may by notice in writing to the Vendor or his Solicitors rescind this Agreement and the Vendor shall thereupon return the deposit to the Purchaser but without any interest and pay the Purchaser his costs of and incidental to the investigation of the title such costs to be taxed as between Solicitor and Client

(2) The last preceding sub-clause shall apply to any agreement for sale deemed to be concluded under the right of repurchase hereinbefore contained as though the expression " the Purchaser " were substituted for the expression " the Vendor " and vice versa wherever the same occur.

Definition clause.

9. The expressions " the Vendor " and " the Purchaser " shall where the context so admits include their respective executors administrators and assigns.

AS WITNESS *etc.*

(*c*) It appears that the Vendor will have to be content with his right to recover the amount from the Purchaser personally; the right of pre-emption cannot be kept open after completion, and there are obvious practical objections to charging the sum on the property by the conveyance.

Form 18

Underlease Mortgagee Concurring where the Mortgage Contains a Clause Barring the Underlessor from Exercising his Leasing Powers (*a*).

Parties. THIS UNDERLEASE is made the —— day of —— 19— BETWEEN THE —— BUILDING SOCIETY of *etc.* incorporated under the Building Societies Act 1874 (hereinafter called "the Society" which expression where the context admits includes the persons from time to time entitled in reversion immediately expectant on the term hereby granted) of the first part THE —— BUILDING COMPANY LIMITED whose registered office is at —— *etc.* (hereinafter called "the Company") of the second part and A B of *etc.* (hereinafter called "the Purchaser") of the third part

Recitals: WHEREAS:—

lease; 1. By a Lease (hereinafter called "the Lease") dated the —— and made between C D of the one part and the Company of the other part ALL THAT *etc.* [parcels as described in the Lease] were demised to the Company for the term of 999 years from the —— day of —— at the yearly rent of £—— subject to the covenants by the lessee and conditions by and in the Lease reserved and contained.

mortgage; 2. By a Mortgage (hereinafter called "the Mortgage") dated the —— day of —— made between the Company of the one part and the Society of the other part ALL and singular the property comprised in the Lease was demised to the Society for the said term of years granted by the Lease (except the last ten days thereof) by way of mortgage for securing the discharge by the Company to the Society of all moneys owing to the Society by the Company.

buildings erected; 3. The Company has erected or caused to be erected upon the said plot of land comprised in the Lease —— dwelling-house.

state of mortgage debt; 4. There is now owing to the Society on the security of the Mortgage a sum in excess of the purchase money hereinafter mentioned.

agreement for underlease. 5. The Company has agreed to grant to the Purchaser an Underlease of the property hereinafter described for the term and at the rent and subject to the covenants and conditions hereinafter reserved and contained for the sum of £—— and the Society being satisfied with the security which will remain after executing this deed has agreed to join herein in manner hereinafter appearing.

NOW THIS DEED WITNESSETH as follows:—

Demise. 1. IN pursuance of the said agreement and in consideration of the sum of £—— to the Company now paid by the Purchaser at the request and with the consent of the Society (the receipt of which sum the Company hereby acknowledges) and also in consideration of the rent and the underlessees' covenants and conditions hereinafter reserved and contained the Society at the request of the Company hereby demises and the Company hereby demises and confirms unto the Purchaser

Parcels. ALL THAT *etc.* [here set out particulars of property sold] EXCEPT AND RESERVING hereout to the Company the free passage and running of water and soil from any dwelling-house or building erected or to be erected on any part of the adjoining land belonging to the Company

(*a*) This form was drafted by Mr. P. S. Brown, of Preston. Stamp *ad valorem* on the consideration and rent.

by and through the sewers drains and channels of or belonging or which will belong to the premises hereby demised TO HOLD the same unto the Purchaser for the term of 998 years from the —— day of —— YIELDING AND PAYING therefor during the term hereby granted the yearly rent of £—— by equal half yearly instalments on 1st May and 1st November in every year clear of all deductions (except Landlord's property tax) the first payment or a proportionate part thereof calculated from the date hereof to be made on the —— next. Reddendum.

2. THE Purchaser hereby covenants with the Society and also as a separate covenant with the Company in manner following that is to say:— Covenants by underlessee:

(1) To pay the said yearly rent hereby reserved at the times and in manner aforesaid to pay rent, rates and taxes;

(2) To pay and discharge all present and future rates taxes duties assessments impositions outgoings and charges whatsoever whether parliamentary parochial or of any other description payable in respect of the property hereby demised and whether by Landlord or Tenant (Landlord's property tax only excepted)

(3) To keep the said dwelling-house and the appurtenances thereto in good and substantial repair and to permit the Company and the Society and their respective agents once in every year to enter into and upon the said premises to view the condition thereof to repair;

(4) To insure the said premises and keep the same insured against loss or damage by fire in some Insurance Office of repute for the full value of the buildings erected on the said plot of land AND to pay all premiums payable in respect of such insurance immediately the same become due and to produce to the Company and the Society or their respective agents the policy of such insurance and the receipt for the current year's premium payable in respect thereof AND in case of destruction or damage by fire with due expedition to lay out all sums of money received from the Insurance Company in restoring or rebuilding the same to the satisfaction of the Company and the Society or their respective Surveyors to insure;

(5) At all times during the said term to perform and observe the covenants (except for the payment of rent) and conditions contained in the Lease so far as the same relate to or affect the premises hereby demised and to keep the Company and the Society indemnified therefrom and from and against all actions proceedings costs damages claims demands and liability for or in respect of any breach of any of the said covenants and conditions (except and so far as aforesaid) AND also will upon the exercise of any power of re-entry herein contained or on the expiration of the term hereby granted peaceably and quietly surrender and deliver up to the Society the premises hereby demised. observe covenants in lease.

3. PROVIDED ALWAYS that if the said yearly rent of £—— hereby reserved or any part thereof shall at any time be in arrear and unpaid for twenty-one days after the same shall have become due (whether legally demanded or not) or if the Purchaser shall at any time fail to perform or observe any of the covenants conditions and agreements herein contained and on his part to be performed and observed then and in any such case it shall be lawful for the Society or any person or persons authorised by them in that behalf to re-enter into and Proviso for re-entry.

upon the premises hereby demised or any part thereof in the name of the whole and the said premises peaceably to hold and enjoy thenceforth as if this Underlease had not been made without prejudice however to any right of distress action or remedy which may have accrued under this deed prior to such re-entry.

Covenant by underlessor to observe covenants in lease and for indemnity.

4. THE Company hereby covenants with the Purchaser that the Company will at all times during the term hereby granted pay the said yearly rent of £—— reserved by the Lease and perform and observe all the covenants and conditions therein contained so far as the same relate to and ought to be performed in respect of such portion of the property comprised in the Lease as is not hereby demised AND will keep the Purchaser indemnified therefrom and from and against all actions proceedings costs damages claims demands and liability in respect thereof.

Proviso for underlessee to withhold rent and collect rent of other property comprised in lease if called on to pay rent reserved by lease.

5. PROVIDED ALWAYS and it is hereby expressly agreed by the Society and the Company that in case the Purchaser or his tenants shall at any time or times during the term hereby granted be called upon to pay and shall actually pay the said yearly rent of £—— or any part thereof or shall pay or incur any money losses damages or expenses on account of the non-payment thereof or on account of the breach non-observance or non-performance of any of the covenants and conditions which ought to be observed and performed in respect of the property demised by the Lease and not hereby demised it shall be lawful for the Purchaser to withhold payment of the said yearly rent of £—— hereby reserved until thereby he shall be fully reimbursed in respect of the payment of the said yearly rent of £—— and such loss costs charges or damages as aforesaid AND also (by way of additional or alternative remedy) to enter upon and remain in possession or receipt of the rents and profits of such part of the plot of land comprised in and demised by the Lease as is not hereby demised and the buildings erected thereon until thereby or by the means aforesaid or otherwise he shall be fully reimbursed all costs charges or damages so sustained paid or incurred PROVIDED ALWAYS that the power last hereinbefore contained shall so far as regards such portions of the plot of land comprised in the Lease as have already been or may hereafter be demised at a yearly rent or rents be exercisable only in respect of and be limited to the perception of the yearly rent or rents reserved by the underleases by which the said portions have been or may be so demised.

Quiet enjoyment.

6. THE Society and also the Company as to their own respective acts and deeds but not further or otherwise hereby respectively covenant with the Purchaser that the Purchaser paying the yearly rent hereby reserved and performing and observing the covenants and conditions herein contained and on his part to be observed and performed shall and may during the said term hereby granted peaceably and quietly possess and enjoy the premises hereby demised without any lawful interruption eviction or disturbance from or by the covenanting parties respectively or any persons lawfully or equitably claiming from or under them respectively.

To pay rent to mortgagor.

7. The Purchaser shall pay the said rent hereby reserved to the Company or other the person or persons for the time being entitled to the ultimate right of redemption in the premises hereby demised until

the Society shall by notice in writing require the payment of the said rent to themselves and until such notice the Company or other the person or persons entitled as aforesaid shall have the like remedy by distress for recovery of arrears of the said rent as they would have had if no incumbrance on their estate had been created and shall and may exercise all the rights and powers hereby conferred on the Society.

8. [*Agreement and declaration as to party walls etc.*]

9. [*Acknowledgment by the Society and covenant by the Company as to production of the Lease and Mortgage.*]

10. [*Certificate as to value.*]

IN WITNESS *etc.*

Form 19

Borrower's Covenant for Payment of Mortgage Interest to vary with Building Society Rate (*a*).

THE Mortgagor hereby covenants with the Mortgagee to pay to h on the —— day of —— next the sum of £—— with interest thereon in the meantime computed from the date of this deed at the rate of £—— [rate above/below current building society rate] per centum per annum and also so long after that day as any principal moneys remain due under this deed to pay to the Mortgagee interest on the said sum of £—— by half yearly payments on the —— day of —— and the —— day of —— in every year at the rate of £—— per centum per annum above/below the current rate charged one month before the time of each such payment to borrowers by the —— Building Society on the security of mortgaged property.

Form 20

Indemnity to Trustees of Settlement on Trust for Sale in Respect of an Unauthorised Purchase of a House. Purchase at the Request of the Life Tenant (*b*).

THIS DECLARATION OF TRUST is made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Beneficiary") of the one part and C D of *etc.* and X Y of *etc.* (hereinafter called "the Trustees") of the other part Parties.

WHEREAS :— Recitals:

1. By a Settlement (hereinafter called "the Settlement") dated the —— day of —— and made between the Beneficiary of the first part . . . [Settlors] . . . of the second part and the Trustees of the third part The dwelling-house known as —— and certain stocks and shares and monies were to be held by the Trustees Upon trust for sale (with power to postpone sale) in trust for the Beneficiary during h life and after h death the Trustees were to hold the capital and income of the trust funds In trust for all or any the children or child of the Beneficiary on attaining twenty-one years. settlement;

(*a*) This form was drafted by Mr. P. S. Brown, of Preston.
(*b*) Stamp 10s. This form was drafted by Mr. P. S. Brown, of Preston.

sale and purchase.

2. The Beneficiary is desirous of selling the said dwelling-house held on the trusts of the Settlement as aforesaid and has asked the Trustees to employ the net proceeds of sale in purchasing the freehold dwelling-house known as —— for the sum of £—— and the Trustees have agreed to such sale and purchase upon receiving the indemnity hereinafter appearing.

NOW THIS DEED WITNESSETH that for the purpose of carrying the said desire into effect and in consideration of the premises it is agreed as follows :—

Indemnity to trustees.

1. As between the parties hereto the Settlement shall be read and construed in all respects as if the investments thereby authorised had originally allowed the purchase of the said dwelling-house now to be purchased.

2. The Trustees shall not in anywise be held responsible or liable for loss by the Beneficiary arising from the purchase of the said dwelling-house now to be purchased.

3. The Beneficiary will use h best endeavours to ensure that all persons of full capacity entitled or to become entitled to an interest in the Settlement shall enter into covenants with the Trustees and charges to secure the full and effectual indemnity of the Trustees in respect of the said purchase.

4. The Beneficiary for h self h executors administrators and assigns hereby covenants with the Trustees and every and each of them respectively that h the Beneficiary will at all times hereafter keep the Trustees and their respective executors administrators estates and effects indemnified and saved harmless from and against all claims demands actions suits proceedings liability costs damages and expenses by reason or in respect of the purchase of the said dwelling-house —— aforesaid.

5. The Beneficiary hereby charges h life interest in the Settlement with the indemnity of the Trustees and their respective executors administrators estates and effects in respect of the matter aforesaid and with the payment of any sums which may become payable to them or any of them respectively in respect of such indemnity under the covenant hereinbefore contained.

IN WITNESS *etc.*

[*Executed by all Parties.*]

Form 21

Settlement on Trust for Sale of Freeholds for the Benefit of Infant Children, to Avoid Income Tax and Surtax

Drafted by E. H. Bodkin of Lincoln's Inn

I

Conveyance on Trust for Sale

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Settlor) of the one part and THE

SETTLOR and B of *etc.* (hereinafter collectively referred to as the Trustees) of the other part

WHEREAS :— Recitals:

(1) The Settlor is the estate owner of the fee simple free from incumbrances of the property intended to be hereby assured seisin;

(2) The Settlor is desirous of settling the said property for the benefit of his children in manner hereinafter appearing desire to settle.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for his said children WITNESSETH and IT IS HEREBY AGREED AND DECLARED as follows :—

1. The Settlor As SETTLOR hereby conveys unto the Trustees ALL THAT *etc.* Conveyance. Parcels.

To HOLD unto the Trustees in fee simple UPON TRUST that they shall sell the same or any part thereof with power to postpone such sale and shall hold the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part of the same property as shall for the time being remain unsold (after payment of outgoings) Habendum.

Upon the Trusts and with and subject to the powers and provisions declared and contained concerning the same in a Settlement already prepared and intended to bear even date herewith and to be made between the same persons who are parties to this Conveyance and in the same order.

[2. DURING the life of the Survivor of the Trustees and of the issue now living of His Late Majesty King George V and twenty-one years after the death of such survivor the Trustees or other the Trustees or Trustee for the time being of this Conveyance may by way of extension of the powers conferred on them by statute raise money by mortgage for any purpose for which they can apply capital money and the provisions of section seventeen of the Trustee Act, 1925, shall apply for the protection of the mortgagee.] Additional power to mortgage.

3. The power of appointing a new trustee or new trustees of this Conveyance shall be vested in the Settlor during his life. Power to appoint new trustees.

[4. The covenant implied herein by the Settlor conveying and being expressed to convey as Settlor shall not render him or any person deriving title under him liable to discharge or get in any incumbrance or estate not created by the Settlor or any such person.] Limitation of liability under covenants for title (*a*).

[5. It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the property conveyed or transferred exceeds [£500] [£1500].] Certificate as to value (*b*).

IN WITNESS, *etc.*

(*a*) This clause may be desirable if the title is not fully gone into before the Settlement.

(*b*) When the value exceeds £1,500 but does not exceed £1,950 a Certificate that the transaction does not form part of a larger transaction or of a series of transactions should be substituted.

II

Settlement of the Proceeds of Sale

Parties. THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Settlor) of the one part and the SETTLOR and B of *etc.* (hereinafter collectively referred to as the Trustees) of the other part

Recitals: WHEREAS :—

conveyance of even date; (1) By a Conveyance (hereinafter called the Conveyance) bearing even date with but executed before this Settlement and made between the same parties who are parties to this Settlement and in the same order certain freehold property situate at —— in the County of —— and therein more particularly described was conveyed to the Trustees in fee simple Upon Trust to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of sale (after payment of costs) and the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) upon the trusts and subject to the powers and provisions declared concerning the same by a Settlement therein referred to being this Settlement

names of children. (2) The Settlor has issue a Son D (hereinafter called the Son) who was born on the —— day of —— 19— and a Daughter E (hereinafter called the Daughter) who was born on the —— day of —— 19—

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for the Son and the Daughter WITNESSETH and IT IS HEREBY AGREED AND DECLARED as follows :—

Trust to invest. 1. The Trustees shall hold the net moneys to arise from any sale made under the recited trust for sale in the Conveyance of the property thereby assured or any part thereof UPON TRUST to invest the same when received and any other capital moneys which may be received by the Trustees in the names of the Trustees in or upon any of the investments hereinafter authorised with power at their discretion to vary such investments for others of a like nature

Trusts of trust fund. 2. The Trustees shall hold the said net moneys to arise from any such sale as aforesaid and any such capital money as aforesaid and the investments for the time being representing the same respectively (which moneys and investments are hereinafter called the Trust Premises) and the income thereof and the net rents and profits of the unsold portion for the time being of the said property assured by the Conveyance (which rents and profits are hereinafter deemed to be included in the income of the Trust Premises) Upon the Trusts and with and subject to the powers and provisions following that is to say :—

Son's moiety for him at twenty-two. (1) IN TRUST as to one moiety thereof (hereinafter called the Son's Moiety) for the Son if and when he shall attain the age of twenty-one years and —— days (hereinafter called the specified age) (*c*)

(*c*) The number of days to be inserted will be the number of days between the child's twenty-first birthday and the next April 5, the object being to prevent the interest vesting during a financial year at the commencement of which the child is an infant and

(2) During the residue of the life of the Settlor or until the Son shall attain the specified age in the lifetime of the Settlor or die in such lifetime (whichever period shall be the shortest) the Trustees may pay or apply the income of the Son's Moiety or such part of such income as the Trustees in their absolute and uncontrolled discretion (having regard to the age and requirements of the Son and his children if any in existence for the time being the amount of any other fund available for the purpose and the ability of the Settlor to maintain him) from time to time think fit for or towards the maintenance education or benefit of the Son and the Trustees may either apply the said income or so much thereof as aforesaid themselves or pay the same to the Settlor for the purposes aforesaid and the Settlor shall be liable to account for the application of the same if so required by the Trustees but the Trustees shall nevertheless not be under any liability for not requiring an account or seeing to the application thereof Power of maintenance.

(3) During the period aforesaid the Trustees shall accumulate the residue (if any) of the income of the Son's Moiety not so paid or applied as aforesaid in the way of compound interest by investing the same and the resulting income from time to time in any of the investments hereinafter authorised with power to vary such investments and all accumulations so produced and the investments for the time being representing the same shall be an accretion to and follow the destination of the capital of the property from which they arose and as one fund with such capital for all purposes [but the Trustees may nevertheless apply accumulations of income or any part thereof as if they were income arising in the current year]

(4) In the event of the Settlor dying before the Son shall attain the age of twenty-one years the statutory power of maintenance shall apply to the Son's Moiety during the residue of his minority Statutory powers to apply.

(5) The statutory power of advancement shall apply to the Son's contingent interest (*d*)

(6) From and after the date when the Son attains the age of twenty-one years or (if the Settlor is then living) from the death of the Settlor the income of the Son's Moiety shall be payable to the Son for his own use and benefit absolutely until he shall attain the specified age or die under that age but not so as to vest the capital (*e*) Payment of income to son.

(7) If the trusts hereinbefore declared concerning the Son's Moiety shall fail then subject to any exercise of the powers hereby or by law vested in the Trustees the Son's Moiety shall be held upon the trusts and with and subject to the powers and provisions hereinafter Accruer clause.

---

unmarried. The trust will then fall within the exception in s. 38 of the Finance Act, 1938, and in s. 28 of the Finance Act, 1946; the Settlor will only have an interest on the death under twenty-two of a beneficiary who would become entitled on attaining that age. If the issue of a deceased child is provided for, either by making the share vest on April 5 next after marriage, or by substitution of the deceased child's issue, which are possible courses, there is a danger of the income of the funds being treated as the Settlor's income for surtax purposes. It is usually desired that the Settlor shall so far as possible retain command over the funds in the event of the death of the children without issue; subject to the risk of the child dying under the specified age leaving issue the above form may be used.

(*d*) Advances made during a financial year at the commencement of which the Son was an infant and unmarried may be treated as the Settlor's income for tax purposes, but only so far as they represent accumulations of income.

(*e*) This provision may render estate duty payable if the son dies over twenty-one but under the specified age, but this is unavoidable—*Re Jones*, [1947] Ch. 48.

declared and contained concerning the moiety of the Trust Premises hereinafter directed to be held in trust for the benefit of the Daughter or as near thereto as circumstances will permit and as one fund therewith for all purposes

Trusts of daughter's moiety.

(8) The remaining Moiety of the Trust Premises (hereinafter called the Daughter's Moiety) shall be held upon the like trusts and with and subject to the like powers and provisions (including the accruer clause) for the benefit of the Daughter as are hereinbefore declared concerning the Son's Moiety in the same manner in all respects as if the same were repeated herein with the substitution of "the Daughter" for "the Son" wherever the latter expression occurs but with the variation that the specified age shall be twenty-one years and —— days

Ultimate trust for settlor.

(9) Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the Trust Premises shall be held IN TRUST for the Settlor absolutely (*f*).

Investment clause.

3.—(1) Money subject to the trusts hereof may be invested in or upon

(i) The Public Stocks Funds or Government securities of the United Kingdom or any Colony

(ii) Securities the interest on which is guaranteed by Parliament.

(iii) Metropolitan or London County Stock or the stocks bonds debentures or other securities of any municipality county or district council public body or local authority in the United Kingdom

(iv) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares of any company public or private (wherever carrying on business) incorporated by Special Act or by or under any Public General Act or Acts of the Imperial Parliament or the Legislature of any Colony or by Royal Charter

(v) The security of any interest for life or vested or contingent interest in real or personal property in the United Kingdom together with a policy of assurance on the life or against the contingency

(vi) Freehold or leasehold securities (whether or not by registered charge under the Land Registration Act, 1925), together in the case of leaseholds having less than sixty years to run at the date of such investment with a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent

(vii) The purchase of freehold ground rents or other landed property in the United Kingdom of any tenure but of leaseholds only if at least sixty years of the term on which the same are held is unexpired

(viii) The shares or deposits of any permanent building society registered in the United Kingdom.

(2) For the purpose of this clause the expression "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland and "Colony" shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any

(*f*) See note (*e*), *ante*.

province or State having a local Legislature and forming part thereof respectively but not the Irish Free State.

(3) The Trustees shall have power (i) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (ii) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all money remaining due thereon and to vary the terms of any such security.

4. The Trustees may (i) determine what moneys are to be considered as capital and what income (ii) determine what expenses costs and outgoings are properly payable out of capital or income (iii) exercise the powers of appropriation conferred by section 41 of the Administration of Estates Act 1925 without any of the consents requisite for the execution of such powers by personal representatives (iv) determine all matters of doubt and questions arising in the execution of the trusts and powers hereof and every such determination (whether expressly or impliedly made) shall be conclusive and binding upon all persons then or thereafter to become interested under the trusts or powers hereof.

[5. Power for professional trustee to charge.]

6. The power of appointing a new trustee or new trustees hereof shall be vested in the Settlor during his life. Power to appoint new trustees.

IN WITNESS *etc.*

Form 22

AGRICULTURE ACT, 1947.

I

Inquiries Preliminary to Contract (*a*).

1. Is any Supervision Order or Dispossession Order in force in respect of the land or any part thereof?

Has any such Order ever been made?

2 (i). Does the land comprise one or more agricultural units? Does any part of the land comprise part of an agricultural unit of which the whole is not included in this contract?

(ii) Has any Order prohibiting the sale of part of an agricultural unit been made in respect of the area.

II

Clauses in Contract.

1. The Vendor will not do or omit or suffer to be done or omitted prior to completion any act matter or thing whereby the land may become liable to the making of a Supervision Order under the Agriculture

(*a*) Assuming these inquiries have not been made prior to contract they should be made as requisitions on title. Failure to disclose most of these matters would seem to be good ground for declining to complete the contract.

Act, 1947, but will continue to do and omit all things necessary to preserve the land in a fit and proper state and condition according to the rules of good estate management and good husbandry according to the said Act [and the conveyance shall contain a clause that any such act or omission on the part of the Vendor prior to completion shall be deemed to constitute a breach of the covenants for title therein contained] (*b*).

2. That part of the land coloured green on the plan is subject to a Supervision Order [or an Order for Dispossession] but the Vendor will take all necessary steps to obtain the approval of the County Agricultural Executive Committee under the provisions of the Agriculture Act, 1947 (*c*).

Form 23

TOWN AND COUNTRY PLANNING ACT, 1947 (*d*).

Contract for Sale.

(i) The land is sold as freehold for the existing use as a [single private dwelling-house *or* two dwelling-houses or two dwelling-houses being flats *or as the case may be*].

(ii) The sale does not include any right to development value under the Town and Country Planning Act, 1947 (*e*) [and the Purchaser will do or permit any act matter or thing at the Vendor's expense which may be requisite or necessary to enforce the Vendor's claim to such development value].

(iii) The Vendor will not do or suffer any act matter or thing whereby any obligation or regulation under the Town and Country Planning Act shall be infringed so as to prejudice the Purchaser or render him or the property hereby agreed to be sold subject to any liability under the said Act [and the Vendor will enter into any necessary covenant in the conveyance to give effect to this clause of the contract].

(iv) The Vendor will at the request and cost of the Purchaser do or permit any act matter or thing including the service of any notices or the making of any applications which prior to completion may be necessary to oppose any proposal on the part of any planning authority affecting the land hereby agreed to be sold.

(v) The Vendor is not aware that any development within the meaning of the Town and Country Planning Act has been made on the land agreed to be sold and the Purchaser shall assume this to be the case, *or* the Vendor will in the Conveyance covenant as part of the

(*b*) It is at least arguable that without any express declaration such an act or omission would be a breach of the covenants for title, but an express declaration is clearly desirable while the matter remains uncertain.

(*c*) Land subject to a Supervision Order or Dispossession Order can be sold, but the order remains binding unless the approval to the sale is obtained: s. 13.

(*d*) This Act comes into force generally on July 1, 1948. It is necessary, therefore, to take immediate steps to deal with some of its problems. It is extremely difficult to forecast all its implications, but it is highly desirable to safeguard the Purchaser to some extent.

(*e*) Strictly this may be unnecessary because development value is transmissible as personal property but it may save disputes to insert it.

covenants for title that no development within the meaning of the Town and Country Planning Act has been made or suffered by the Vendor [and his predecessors in title] (*f*) [save as disclosed in the contract].

(vi) The Vendor will do or concur with the Purchaser in doing any act matter or thing prior to completion requisite or necessary to comply with any order, direction notice or requirement of any Planning Authority or the Minister of Town and Country Planning given or made in accordance with the Town and Country Planning Act (*g*).

(vii) The land agreed to be sold is subject to a Development Charge for £ [repayable by instalments of £ of which instalments have been paid to the date of this contract] and the land is sold subject to the [unpaid instalments at the date of completion of the] said charge [*or* but the said charge will be discharged prior to completion].

(viii) The land agreed to be sold is subject to the following planning restrictions :—

(a) all trees are subject to a "Trees Preservation Order";

(b) the premises are scheduled to be used only as [a shop *or* warehouse or *as the case may be*];

[*Add any other clauses that may be material*].

The Purchaser shall not object or make any requisition concerning such restrictions.

(ix) The land is sold together with the right to claim development value and the Vendor will make or do or concur in making or doing any application or other thing requisite or necessary to claim the development value and will assign the benefit of such right (*h*).

(x) The land is sold subject to all restrictions, notices, rights of compulsory acquisition or other charges or obligations (not otherwise herein referred to) imposed by or in connection with the Town and Country Planning Act, 1947, and the Purchaser shall not make any requisition or objection concerning the same (*i*).

Form 24

Deed Exercising a Power of Revocation Contained in a Voluntary Settlement, with the Consent of the Trustees, so far as is Necessary to Enable a Trust Corporation to be Appointed Trustee and to Charge and be Paid its Fees out of the Trust Fund (*a*).

THIS DEED is made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part Parties.

(*f*) This extension may be necessary in later transactions where property has recently changed hands.

(*g*) For example, an order for discontinuing any use of the property under s. 26 of the Act.

(*h*) To give effect to this by conveyance, see clause 11, *ante*, p. 338.

(*i*) This general clause would almost certainly be no protection in respect of any matter of which the Vendor had notice and which he ought to disclose.

(*a*) Stamp 10s. It not infrequently happens that a settlement contains no power to appoint a trust corporation and to provide for the payment of its fees out of the trust property. One way out of this difficulty, where a settlement contains a power of revocation and appointment, is to exercise the power and write a power for a trust corporation to charge into the settlement.

Recitals:

WHEREAS :—

settlement and power of revocation;

1. This Deed is supplemental to an indenture of settlement (hereinafter called "the Settlement") made the —— day of —— BETWEEN the Settlor of the one part and D and E as trustees of the other part whereby the Settlor vested in the said Trustees certain reversionary interests and the proceeds of sale of certain lands to be held by them upon discretionary trusts for the benefit of the Settlor during her life and after her death upon trust for any husband who might survive her her issue and otherwise as therein provided and by clause 13 thereof it was provided that the Settlor might from time to time by deed revocable or irrevocable with the consent in writing of the Trustees for the time being thereof not being less than two in number revoke all or any of the trusts thereinbefore declared concerning all or any part or parts of the trust premises thereby settled and might direct that the part or parts of the trust fund to which such revocation should extend should be held in trust for herself absolutely or otherwise as she might think proper.

no power to appoint trust corporation;

2. The Settlement contained no power on the appointment of a trust corporation to be trustee thereof to pay the remuneration of any such trust corporation.

trustees;

3. The Trustees are the present trustees of the Settlement.

desire to revoke.

4. The Settlor is desirous of revoking the trusts powers and provisions declared of and concerning the trust fund comprised in the Settlement and declaring new trusts thereof to the extent necessary to enable a bank or other trust corporation appointed to be a trustee thereof to be paid remuneration out of the capital and income of the trust premises to the extent and in the manner hereinafter appearing and the Trustees have agreed to join in these presents for the purpose of testifying their assent to such revocation and declaration.

Revocation.

NOW THIS DEED WITNESSETH that for effecting such object as aforesaid the Settlor with the consent of the Trustees (hereby testified) in exercise of the power for this purpose vested in her by the settlement as aforesaid and in exercise of every other power enabling her in this behalf hereby revokes the trusts and powers in the settlement contained so far but no further or otherwise than is necessary to give effect to the trusts hereinafter declared and she hereby declares that the settlement shall henceforth be read and construed as if it contained a provision authorising a trust corporation to be appointed to be sole trustee or one of the trustees thereof and authorising any trust corporation so appointed to charge and be paid out of the capital and income of the said trust premises remuneration according to its scale in force at the date of such appointment and if a bank be appointed trustee as aforesaid authorising such bank to act as banker to and make advances to the trust without accounting for profits so made or brokerage commission received in respect of the trust premises or any part thereof and in all respects as if it were not a Trustee of the settlement.

IN WITNESS *etc.*

Form 25

AGRICULTURE ACT, 1947.

Agricultural Tenancy Agreement framed in accordance with the Agriculture Act, 1947: Variations for Lady-day and Michaelmas Tenancies.

(*This Precedent was drafted by Mr. J. Muir Watt, M.A., of the Inner Temple.*)

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression where the context so admits shall include the person or persons for the time being entitled to receive the rent hereby made payable) of the one part and B of *etc.* (hereinafter called "the Tenant" which expression where the context so admits shall include his executors administrators and assigns) of the other part Parties.

WHEREBY it is agreed as follows:—

1. The Landlord agrees to let and the Tenant agrees to take ALL THAT farmhouse cottages buildings farm and lands (hereinafter called "the Farm") situate in the parish of —— in the county of —— commonly known as —— the particulars whereof are (more or less) specified in the First Schedule hereto which said premises by way of identification only are delineated on the plan annexed hereto and thereon coloured pink (*a*) as the same are now occupied by —— TOGETHER with all fixtures and fittings thereon and the benefit of a right of way on foot and with animals and vehicles over the roads and tracks coloured green on the said plan at all times by day and by night and for all purposes SUBJECT to all public and private rights of way and all other easements and agreements if any affecting the same and subject also to the rights of the outgoing tenant and to the exceptions and reservations hereinafter mentioned THE TENANCY to be from the —— day of —— 19— for one year certain and thereafter from year to year until it is determined at the end of the second or any subsequent year by either party giving to the other not less than twelve calendar months' notice in writing AT the yearly rent of £ —— payable by four equal quarterly payments on the —— day of —— the —— day of —— the —— day of —— and the —— day of —— in every year the first payment to be made on the —— day of —— 19— and the last two quarters' payments to become due and payable on the —— day of —— preceding the termination of the tenancy. Parcels. Rent.

2. The letting is subject to the following exceptions and reservations in favour of the Landlord that is to say:— Exceptions and Reservations:

(1) All timber timber-like trees (including fruit trees but not the fruit thereof) tellers saplings underwood and plantations with liberty for the Landlord and all persons authorised by him to mark fell cut and carry away the same at any time making the Tenant reasonable compensation for any damage actually caused thereby timber;

(*a*) Paragraph 2 of the Sixth Schedule to the Agriculture Act, 1947, requires the tenancy agreement to give particulars with sufficient description, by reference to a map or plan, to identify the holding.

minerals; (2) All mines and minerals quarries clay stone flints chalk brick earth gravel sand and marl in under or upon the Farm or any part thereof (with liberty however for the Tenant to use such stones as are on the surface of the land for repairing the roads and paving on the Farm but not for sale) with power for the Landlord and all persons authorised by him to dig search for get win work and carry away the same (including power to let down the surface) the Landlord making the Tenant reasonable compensation for any damage actually done thereby to the surface buildings or crops

right of entry; (3) Full right and liberty for the Landlord and all persons authorised by him with or without horses carts carriages and vehicles to enter upon the Farm or any part thereof for all or any of the above and all other reasonable purposes

sporting. (4) (Subject to the rights of the Tenant under the Ground Game Act 1880 and the Ground Game (Amendment) Act 1906) all game wildfowl woodcock snipe landrail (including nests and eggs of the same) hares rabbits foxes and fish with the exclusive right for the Landlord and all persons authorised by him to preserve and take the same and to hunt course shoot fish and sport on the farm.

Tenant's obligations: To pay rent. 3. The Tenant hereby agrees with the Landlord as follows:—

(1) To pay during the continuance of this Agreement on the days and in the manner aforesaid the rent hereby made payable or any rent substituted therefor by agreement or by virtue of the provisions for variation of rents contained in the Agricultural Holdings Acts 1923 to 1947 (*b*) and all present and future rates (including occupiers' drainage rates) taxes charges assessments and outgoings whatsoever payable in respect of the Farm except landlord's property tax land tax tithe redemption annuity and owners' drainage rates (*c*)

To pay outgoing Tenant's valuation. (2) To pay to the Landlord on demand the sum paid payable or to become payable by the Landlord to the outgoing tenant by way of compensation for unexhausted improvements crops acts of husbandry and otherwise in respect of the Farm (except compensation for disturbance or damage by game) without deducting therefrom any sum paid payable or to become payable by the outgoing tenant for dilapidations or breaches of agreement in respect of the Farm and also to pay to the Landlord on demand the amount of any costs or expenses incurred by the Landlord in respect of any valuation or arbitration or otherwise in ascertaining such sums (*d*)

(*b*) See s. 35 of the Agriculture Act, 1947.

(*c*) Paragraph 5 of the Sixth Schedule to the Agriculture Act, 1947, provides that the tenancy agreement must state the incidence of the liability for land tax and rates (including drainage rates).

(*d*) If the amount of the tenant right valuation is already an ascertained sum at the date of the execution of the tenancy agreement the Inland Revenue Authorities claim *ad valorem* stamp duty upon such part of it as does not consist of loose chattels, unsown seeds, manure in the heap and hay and straw already severed. The ground of the claim is that such an ascertained sum is a consideration consisting of "money" within the meaning of the Stamp Act, 1891. This duty, which is in addition to the duty on the rent, would thus attach to the value of growing crops, acts of husbandry unexhausted manurial values, etc. It can be avoided if the tenancy agreement is signed before the amount of the tenant right valuation is ascertained.

As a result of s. 54 (2) of the Finance Act, 1947, if duty is payable on part of the tenant right valuation, as above explained, the relief from increased stamp duty on the rent, given in certain cases where the rent does not exceed £100 a year, would be lost. This is another reason why the tenancy agreement should be executed before the amount of the tenant right valuation is ascertained. An alternative is to omit this clause from the agreement and make an immediate cash payment.

[**Repair Clauses: Tenant's obligations.** *First alternative—repair clauses reproducing exactly the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948 (*SI* 1948, *No.* 184). *The clauses below reproduce these Regulations with only the slight formal modifications required for the purpose of embodying them in the Agreement. These statutory clauses are, by virtue of section* 37 *of the Agriculture Act,* 1947, *deemed to be incorporated in every contract of tenancy of a holding, existing or future, "except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other". If it is desired to rely on the statutory clauses, therefore, it is not strictly necessary to set them out in the Agreement: if the Agreement is silent it will be deemed to incorporate them. It is, however, desirable to set them out both for convenience of reference and as a reminder to the parties of their obligations. It is possible for the parties to "contract out" of these statutory clauses by express agreement in writing, but if there is a substantial departure from them it may have to be justified before an arbitrator: see the note prefixed to the second alternative* (3A) *below.*] To repair: statutory form.

(3) Except in so far as such obligations are imposed on the Landlord under clause 4 hereof

(i) To repair and to keep and leave clean and in good tenantable repair order and condition the farmhouse cottages and farm buildings together with all fixtures and fittings drains sewers water supplies pumps fences live and dead hedges gates field walls posts stiles bridges culverts ponds watercourses ditches roads and yards in and upon the Farm or which during the continuance of the tenancy hereby created may be erected or provided thereon and to keep clean and in good working order all roof valleys eaves-guttering and downpipes gulleys and grease-traps AND ALSO to use carefully so as to protect from wilful reckless or negligent damage all items for the repair of which the Landlord is responsible under clause 4 hereof and to report in writing immediately to the Landlord any damage however caused to items for the repair of which the Landlord is responsible

(ii) To replace or repair and upon replacement or repair adequately to paint gas-tar or creosote as may be proper all items of fixed equipment as defined in the Agriculture Act 1947 and to do any work where such replacement repair or work is rendered necessary by the wilful act or negligence of the Tenant or any members of his household or employees

(iii) As often as may be necessary and in any case at intervals of not more than seven years properly to clean colour whiten paper and paint with materials of suitable quality the inside of the farmhouse cottages and buildings which have been previously so treated and in each year of the tenancy to limewash the inside of all farm buildings which previously have been limewashed

(iv) Notwithstanding the general liability of the Landlord for repairs and replacements to renew all broken or cracked tiles or slates and replace all slipped tiles and slates from time to time as the damage occurs but so that the cost shall not exceed £5 in any one year of the tenancy

(v) To cut out and lay a proper proportion of the hedges in each year of the tenancy so as to maintain them in good and sound condition

(vi) To dig out scour and cleanse all ponds watercourses ditches and grips as may be necessary to maintain them at sufficient width and depth and to keep clear from obstruction all field drains and their outlets

(vii) To provide free of charge suitable straw or reed for the repair or renewal of thatch

(viii) To repay to the Landlord one-half of the reasonable cost incurred by him—

(a) Under clause 4 (3) hereof in repairs and replacements to floorboards doors windows eaves-guttering and downpipes; and also

(b) Under clause 4 (6) hereof in painting gas-tarring or creosoting doors windows eaves-guttering and downpipes PROVIDED THAT in cases where the last year of the tenancy is not a year in which the Landlord is liable under the said clause 4 (6) to carry out such work the Tenant shall pay to the Landlord on the termination of the tenancy one-tenth part of the estimated reasonable cost thereof in respect of each year that has elapsed since such last painting gas-tarring or creosoting as aforesaid

(ix) If the last year of the tenancy is not a year in which such cleansing colouring whitening papering and painting as is mentioned in paragraph (iii) hereof is due to be carried out to pay to the Landlord on the termination of the tenancy one-seventh part of the estimated reasonable cost thereof in respect of each year that has elapsed since such last cleansing colouring whitening papering and painting as aforesaid

(4) If the Tenant fails to execute repairs for which he is liable under paragraphs (i) (ii) and (iii) of the last preceding sub-clause within one month of receiving from the Landlord a written request specifying the necessary repairs and calling on him to execute them the Landlord may enter upon the Farm and execute such repairs and recover the reasonable cost from the Tenant forthwith

To repair; full repairing liability on tenant.

[**Repair Clauses: Tenant's obligations.** *Second alternative—clauses placing full repairing liability on the Tenant. The clauses which follow "contract out" of the statutory provisions of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948, *and substitute provisions under which the Tenant is subject to full repairing liability. Such contracting out is permissible, but there is nothing to prevent the Tenant from attempting at a later date to reopen the matter by requesting the Landlord to revise the repairing clauses so as to bring them into conformity with the statutory model. If the parties cannot agree to such revision the Tenant may refer the matter to arbitration under section* 37 (2) *of the* 1947 *Act. The arbitrator will then have to determine whether any substantial departure from the statutory model is justifiable "having regard to the circumstances of the holding and of the Landlord and the Tenant". Before contracting out in the following manner, therefore, it should be considered whether the departure is capable of being justified before an arbitrator. If, for example, the Landlord lives at a long distance from the Farm or has to go abroad it may obviously be reasonable to place full repairing liability on the Tenant, which will, of course, be reflected in a reduction of the rent. These are only examples of cases where the departure may be justifiable; there may clearly be many other possible cases. The following draft has been constructed by combining the obligations which the statutory clauses divide between the parties and placing them all on the shoulders of the Tenant. In contracting out it is important to ensure that no "gaps" are left through which the statutory obligations will be let in. No attempt has been made to contract out of the Landlord's liability to insure buildings (see Clause* 4 (3A) *below) in view of the positive wording of paragraph* 7 *of the Sixth Schedule to the* 1947 *Act.*]

(3A) (i) To repair and to keep and leave clean and in good and substantial repair order and condition the farmhouse cottages and

farm buildings together with all fixtures and fittings drains sewers sewage disposal systems waterworks (including the water mains and all parts of the water supply system) dams pumps fences live and dead hedges gates walls posts stiles bridges culverts ponds watercourses ditches roads and yards in and upon the Farm or which during the tenancy may be erected or provided thereon

(ii) To cut out and lay a proper proportion of the hedges in each year of the tenancy so as to maintain them in good and sound condition

(iii) To dig out scour and cleanse all ponds watercourses ditches and grips as may be necessary to maintain them at sufficient width and depth and to keep clear from obstruction all field drains and their outlets

(iv) As often as may be necessary in order to prevent deterioration and in any case at intervals of not more than five years properly to paint with at least two coats of a suitable quality or properly and adequately to gas-tar or creosote all outside wood and iron work (including the inside of all external doors and windows which open outward) of the farmhouse cottages and farm buildings which have been previously painted gas-tarred or creosoted PROVIDED THAT if the last year of the tenancy is not a year in which the Tenant is liable to carry out such work the Tenant shall then pay to the Landlord at the termination of the tenancy one-fifth part of the estimated reasonable cost thereof in respect of each year that has elapsed since such last painting gas-tarring or creosoting as aforesaid

(v) As often as may be necessary and in any case at intervals of not more than seven years properly to clean colour whiten paper and paint with materials of suitable quality the inside of the farmhouse cottages and buildings which have been previously so treated and in each year of the tenancy to limewash the inside of all farm buildings which previously have been limewashed PROVIDED THAT if the last year of the tenancy is not a year in which the Tenant is liable to carry out such cleansing colouring whitening papering and painting the Tenant shall then pay to the Landlord at the termination of the tenancy one-seventh part of the estimated reasonable cost thereof in respect of each year that has elapsed since such last cleansing colouring whitening papering and painting as aforesaid

(4A) If the Tenant fails to execute repairs for which he is liable under the provisions hereof within one month of receiving from the Landlord a written request specifying the necessary repairs and calling on him to execute them the Landlord may enter and execute such repairs and recover the reasonable cost from the Tenant forthwith

To repair: variation of statutory form in the interests of tenant.

[**Repair Clauses: Tenant's obligations.** *Third alternative—modifications of the statutory repair clauses in the interests of the Tenant. The statutory repair clauses set out in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948, *and reproduced in the first alternative above, impose on the Tenant certain liabilities which might conceivably involve him in very substantial expense. Thus the repair of bridges in certain parts of the country might be a serious matter. Again, the repair of the dams, hatches or sluices of the water meadow systems which are to be found in parts of the southern counties, e.g., along the banks of the Avon, might well be very heavy. There may, again, be common sewers which carry drainage from other properties besides the Farm which is the subject of this Agreement. The equipment of water supply systems, such as feed tanks, hydraulic rams or hydrostats may involve a considerable maintenance expense which, particularly if the supplies*

serve other holdings beside the Farm itself, it would be unfair to place on the Tenant. In some of these cases, however, it may be fair to make the Tenant pay a contribution.

It is unnecessary to repeat the statutory clauses again. The following are a few examples of the kind of exceptions and modifications which it may be justifiable in some cases to insert if the statutory clauses are used. In view of section 37 (2) of the 1947 Act they should not be inserted unless they are capable of being justified before an arbitrator "having regard to the circumstances of the holding and of the Landlord and the Tenant".]

(3B) Provided that all repairs and replacements to the dams hatches and sluices of the water meadow system shall be the responsibility of the Landlord [but he may recover one-half of the reasonable cost thereof from the Tenant]

(3C) Provided that the repair of the common sewer which carries the drainage from the Farm and the adjoining property known as Blackacre shall be the responsibility of the Landlord [but he may recover one-half of the reasonable cost thereof from the Tenant]

(3D) Provided that the Landlord shall be responsible for the repair of all bridges over such part of the River X as flows through the Farm [but he may recover one-half of the reasonable cost thereof from the Tenant].

(3E) Provided that all repairs and replacements to the pipes feed tanks and hydraulic rams or hydrostats and all other the equipment of the joint water supply system which serves the Farm and neighbouring parts of the Blank Hall Estate shall be the sole responsibility of the Landlord [*or*, shall be the responsibility of the Landlord, but he may recover etc.]

To permit holdover: Michaelmas tenancy;

(5) (*To be used in the case of a Michaelmas tenancy.*) To permit the Landlord or the outgoing tenant to retain possession (*e*) of the barns and stackyards until the 25th day of March after the commencement of the tenancy hereby created for the purpose of threshing out such corn as has not been threshed out at the date of such commencement (the Tenant taking the straw chaff and colder therefrom without making any payment or allowance for the same) with a like right for the Tenant on the termination of the said tenancy

not to alter buildings;

(6) (Subject to the provisions of section 24 of the Agriculture Act 1947) not to alter or make additions to any existing or erect any new building on the Farm without the previous consent in writing of the Landlord or his Agent

to insure stock and crops;

(7) To insure and keep insured at all times during the tenancy all [live and] dead stock on the Farm and all harvested crops grown on the Farm for consumption thereon (*f*) to the full value thereof

(*e*) This holdover provision (the corresponding right of the tenant is contained in clause 4 (8)) in the case of a Michaelmas tenancy is still useful, since, in spite of the combine-harvester, there may be a number of reasons why corn is not threshed before the end of the tenancy. The provision as to the straw chaff and colder is only inserted as an example of the *kind* of arrangement which may be made and which, if the parties desire it to be effective, should be expressly stated. The arrangement will obviously vary in different parts of the country. The compensation clause (clause 4 (9)) must be made consistent with any such provision.

(*f*) Paragraph 8 of the Sixth Schedule to the 1947 Act requires a clause of this kind to be inserted in written tenancy agreements. The statutory requirement does not extend to livestock, but it may be desirable to insure livestock as well as dead stock and harvested crops grown for consumption on the farm. The statutory repair clause under the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, provides for the insurance of fixed equipment by the landlord but contains no provision as to the insurance of stock or crops—these not being "fixed equipment".

against loss or damage by fire with an insurance company approved by the Landlord in writing and to produce the insurance policy and the receipt for the current premium whenever required by the Landlord and in the event of the destruction by fire of any such harvested crops to return to the Farm the full equivalent manurial value of the crops destroyed in so far as the return thereof is required for the fulfilment by the Tenant of his responsibility to farm the Farm in accordance with the rules of good husbandry

to cultivate in a husbandlike manner;

(8) To cultivate and manage the Farm in a good and husbandlike manner and in accordance with the rules of good husbandry as set out in section 11 of the Agriculture Act 1947 and not to injure or deteriorate the Farm or permit the same to be injured or deteriorated

management of grassland.

(9) Not to mow any grassland more than once in any year or any two years in succession without sufficiently manuring the same and (subject to the provisions of the Agriculture Act 1947) not to break up or convert into tillage any part of the land described as meadow grass or pasture in the First Schedule hereto without the previous consent in writing of the Landlord or his Agent (*g*)

Cropping clause: four course rotation.

(10) To leave the arable land so cultivated in the last year of the tenancy as if the Tenant had followed the four course rotation throughout the tenancy having annually one fourth of such land in wheat one fourth in roots fallow crop or bare fallow one fourth in barley or oats and one-fourth in clover or seeds (*h*)

Prohibition of selling off:

(11) Not (save as hereinafter provided) to sell off or remove from the Farm any hay straw roots or green crops (*i*) or any manure (*k*) produced thereon but to consume all such crops by stock on the Farm and to spread all such manure thereon in a husbandlike manner PROVIDED THAT at the termination of the tenancy the Tenant shall leave on the Farm for the use of the Landlord or the incoming tenant the hay straw roots and green crops then remaining unconsumed and the unused farmyard manure dung and compost being paid or allowed for the same as hereinafter provided

record of cropping, selling off, etc.

(12) To keep and produce on demand for inspection by the Landlord or his Agent an accurate record of all croppings upon the Farm and of all hay straw roots and green crops sold off or removed from the Farm and of the dates of the removal thereof and also a like record (with vouchers or other satisfactory evidence) of the provision made for the return to the Farm of the full equivalent manurial value of all hay, straw, roots and green crops so sold off or removed from the Farm in contravention of this Agreement and of the provision

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(*g*) Provisions for penal rents on the break up of permanent pasture should no longer be inserted in tenancy agreements in view of the amendment of s. 29 of the Agricultural Holdings Act, 1923, by paragraph 7 of the Seventh Schedule to the 1947 Act. Permanent pasture may be ploughed up under s. 14, s. 36, or s. 95 of the 1947 Act.

(*h*) A cropping clause is still necessary, as s. 30 of the 1923 Act remains substantially unaltered. The four course rotation has been used above for simplicity; it is not suggested that it is necessarily the system which present day agricultural technique would regard as appropriate in all cases.

(*i*) Any cash crops which it is intended to sell off, such as potatoes, sugar beet or carrots, should be excepted from this prohibition. This clause should be consistent with the rotation of crops clause.

(*k*) It is now clear as a result of paragraph 8 (1) of the Seventh Schedule to the 1947 Act that "produce" in s. 30 (1) of the 1923 Act does not include manure. A prohibition in the tenancy agreement against the selling off or removal of manure is therefore effective throughout the tenancy and not merely in the last year thereof.

made to protect the Farm from injury or deterioration in consequence of the exercise by the Tenant of his rights as to cropping and disposal of produce under the Agricultural Holdings Acts 1923 to 1947

Last year's obligations: Lady-day tenancy.

(13) To perform in a proper and husbandlike manner in the last year of the tenancy (*l*) the following acts of husbandry (being paid or allowed for the same as hereinafter provided) that is to say:—

(a) To plough prepare manure and sow with wheat such of the arable land as is in due course for wheat in the autumn preceding the termination of the tenancy

(b) To plough all land in due course to be fallowed before the end of November preceding the termination of the tenancy

(c) To sow with his spring corn in the spring preceding the termination of the tenancy good clover or grass seeds

(14) In the event of the Tenant failing to perform the said acts of husbandry or any of them to the satisfaction of the Landlord or his Agent to permit the Landlord or the incoming tenant to enter upon the Farm and do the acts so neglected to be performed to the satisfaction of the Landlord or his Agent as aforesaid and in case of any such entry to allow the Landlord or the incoming tenant free accommodation for horses carts vehicles tractors and implements and to provide such horses with hay and straw at consuming price

(15) To preserve the arable land sown with clover or grass seeds in the last year of the tenancy for the incoming tenant and not to stock any such seeds after harvest

Last year's obligations: Michaelmas tenancy;

[(13A) To sow clover or grass seeds with the Tenant's spring corn in the last year of the tenancy and properly to harrow in the same and not to permit such seeds to be grazed by any stock after harvest AND ALSO to leave in the last year of the tenancy properly fallowed and sown with turnips or other root crop properly hoed and managed the one-fourth part of the arable land in due course for the same being paid or allowed as hereinafter provided (*m*)

(14A) To thresh out such of the Tenant's corn as has not been threshed out at the determination of the tenancy before the 25th day of March next after such determination the Tenant to retain possession of the barns and stackyards for this purpose until the said date PROVIDED THAT the Tenant shall leave the straw chaff and colder for the Landlord or the incoming tenant without receiving any payment or allowance for the same]

to protect game;

(16) To protect and preserve all game wildfowl woodcock snipe and landrail (and the nests and eggs of the same) and also all foxes and fish

to prevent trespass;

(17) To use his utmost endeavours to prevent trespass upon the Farm and the acquisition of any rights of way public or private or easements over the same or any part thereof and at the request of the Landlord or his Agent to give notice to any named person or persons not to trespass upon the Farm and to permit his (the

(*l*) Sub-clauses (13) to (15) inclusive are for use in Lady-day tenancies. Sub-clauses (13A) and (14A) below are for use in Michaelmas tenancies.

(*m*) The tenant's obligations in regard to cultivation, etc., in the last year will depend upon the system of cropping laid down and the practice of the district or the estate. These clauses must be consistent with the cropping clauses. In some cases more detailed provisions than the above may be desired. Sub-clauses (13A) and 14A) are for use in Michaelmas tenancies.

Tenant's) name to be used by the Landlord in any proper legal proceedings against trespassers or poachers on being indemnified by the Landlord against all costs charges and expenses by reason thereof

(18) To reside in the farmhouse and not without the written consent of the Landlord or his Agent to assign sub-let or part with the possession of the Farm or any part thereof (except the cottages and gardens thereto belonging which the Tenant may sub-let to his own employees) and not without the like consent to take in the horses cattle or sheep of any other person to graze on the Farm — to reside on the farm;

(19) To preserve all timber and other trees pollards and saplings from bite of cattle or other injury and not to cut down fell or destroy or lop or top the same or to cause injury thereto by driving nails into them or by attaching wires or fencing thereto or hanging gates thereon or in any other manner — to preserve timber;

(20) To keep and leave the gardens of the farmhouse and all fruit trees on the Farm in good condition and to protect them from injury replacing dead or worn out fruit trees with other fruit trees suitable to the district — to preserve fruit trees;

(21) Not to permit the Farm or any part thereof to be used for the display of advertisements or for any purpose other than for agriculture. — to use for agriculture only.

4. The Landlord hereby agrees with the Tenant as follows:— — Landlord's obligations:

(1) To pay or allow as a deduction to the Tenant the Landlord's property tax land tax tithe redemption annuity and owners' drainage rates charged upon or in respect of the Farm — taxes and rates;

(2) To pay to the Tenant any amount received from the outgoing tenant for dilapidations or breaches of agreement in respect of the matters for which the Tenant is liable under the provisions hereof — dilapidations.

[**Repair Clauses: Landlord's obligations.** *The following sub-clauses* (3) *to* (7) *correspond with the first alternative given above for the Tenant's repairing obligations: see Clause* 3 (3), ante, *and the introductory note thereto. These sub-clauses reproduce exactly with purely formal drafting alterations the Landlord's repairing obligations under the Agriculture* (*Maintenance, Repair and Insurance of Fixed Equipment*) *Regulations,* 1948.] — To repair: statutory form.

(3) To execute all repairs and replacements to the under-mentioned parts of the farmhouse cottages and farm buildings namely: main walls and exterior walls including walls of open and covered yards and garden walls (whether constructed of brick stone timber or other material) but excluding the interior covering of exterior walls save where such interior covering is affected by structural damage to the wall roofs including eaves-guttering and downpipes (the Tenant supplying straw and reed for thatching) and floors doors and windows (excepting glass locks and fastenings) PROVIDED THAT in the case of repairs and replacements to floor boards doors windows eaves-guttering and downpipes the Landlord shall be entitled to recover one-half of the reasonable cost thereof as hereinbefore provided

(4) To execute all repairs and replacements to the water mains the sewage disposal systems (excepting the cleaning thereof and excepting the drains) and to the structure of reservoirs or pump houses of a water supply system

(5) To keep the farmhouse cottages and farm buildings insured to their full value against loss or damage by fire and to execute all

works of repair or replacement to the farmhouse cottages and farm buildings necessary to make good damage by fire being damage not due to the wilful act or negligence of the Tenant (*n*)

(6) As often as may be necessary in order to prevent deterioration and in any case at intervals of not more than five years properly to paint with at least two coats of a suitable quality or properly and adequately to gas-tar or creosote all outside wood and ironwork (including the inside of all external doors and windows which open outwards) of the farmhouse cottages and farm buildings which have been previously painted gas-tarred or creosoted or which it is necessary so to paint gas-tar or creosote PROVIDED THAT in respect of doors windows eaves-guttering and downpipes the Landlord shall be entitled to recover one-half of the reasonable cost of such work from the Tenant as provided in clause 3 (3) (viii) (b) hereof but subject to the proviso therein contained

(7) That if the Landlord fails to execute repairs which are his liability within three months of receiving from the Tenant a written request specifying the necessary repairs and calling on him to execute them the Tenant may execute such repairs and (except to the extent to which under the terms hereof the Tenant is liable to bear the cost) recover the reasonable cost from the Landlord forthwith

To insure: where tenant is under full repairing liability.

[**Repair Clauses: Landlord's obligations.** *If the second alternative given above is used for the Tenant's repairing obligations, viz., a full repairing clause (see Clause* 3 (3A), ante), *the Landlord will not enter into any repairing obligations. It will, however, apparently be necessary for him to enter into an agreement to insure buildings against fire and to reinstate them in case of damage by fire, in accordance with paragraph* 7 *of the Sixth Schedule to the* 1947 *Act. Paragraph* 7 *states specifically that there must be a covenant to this effect "by the landlord". The language used is to be contrasted with the wording of paragraph* 6 *of the same Schedule, which provides, in regard to the repair of fixed equipment, that there must be a covenant "by one or other of the parties" to carry out the work. It would, therefore, appear that a landlord cannot "contract out" of this obligation to insure.*

Instead of placing full repairing liability on the Tenant and relieving the Landlord of all obligations to repair (subject to the special case of damage by fire) the Agreement may, of course, except certain particularly heavy obligations from the Tenant's liability and place them on the Landlord. On the general question of varying the statutory obligations see the introductory note to Clause 3 (3A) *above.*]

(3A) To keep the farmhouse cottages and farm buildings insured to their full value against loss or damage by fire and to execute all works of repair and replacement to the farmhouse cottages and farm buildings necessary to make good damage by fire being damage not due to the wilful act or negligence of the Tenant

To repair: where statutory form is varied in the interests of the tenant;

[**Repair Clauses: Landlord's obligations.** *Modifications of the statutory repair clauses in the interests of the Tenant. The following clauses correspond to Clauses* 3 (3B), 3 (3C), 3 (3D) *and* 3 (3E) *above: see the introductory note to these clauses. The Landlord's agreement to insure in accordance with paragraph* 7 *of the Sixth Schedule to the* 1947 *Act should not in any case be forgotten.*]

(3B) To execute all repairs and replacements to the dams hatches and sluices of the water meadow system [PROVIDED THAT the Landlord may recover one-half of the reasonable cost thereof from the Tenant]

(*n*) See paragraph 7 of the Sixth Schedule to the 1947 Act, which requires a covenant to the above effect to be inserted in all written agricultural tenancy agreements.

(3C) To execute all repairs and replacements to the common sewer which carries the drainage from the Farm and the adjoining property known as Blackacre [PROVIDED THAT the Landlord may recover one-half of the reasonable cost thereof from the Tenant]

(3D) To execute all repairs and replacements to the bridges over such part of the River X as flows through the Farm [PROVIDED THAT the Landlord may recover one-half of the reasonable cost thereof from the Tenant]

[(3E) To execute all repairs and replacements to the pipes feed tanks and hydraulic rams or hydrostats and all other the equipment of the joint water supply system which serves the Farm and neighbouring parts of the Blank Hall Estate (PROVIDED THAT the Landlord may recover one-half of the reasonable cost thereof from the Tenant)]

quiet enjoyment.

(8) To permit the Tenant on paying the rent hereby agreed to be paid and observing and performing the agreements on his part herein contained quietly to hold and enjoy the Farm during the continuance of the tenancy [and the barns and stackyards until the 25th day of March after the termination of the tenancy for the purpose of threshing the last year's crop of corn] (*o*) without any interruption by the Landlord or any person rightfully claiming through or under him

Tenant right: outgoing valuation.

(9) On the Tenant quitting the Farm having observed and performed the stipulations on his part contained in this Agreement to pay to the Tenant (less any sum or sums due from the Tenant to the Landlord for rent dilapidations or otherwise under or by virtue of this Agreement) compensation for hay straw roots green crops manure dung and compost acts of husbandry and all other the tenant right matters specified in Part II of the Fourth Schedule to the Agriculture Act 1947 in accordance with the Agriculture (Calculation of Value for Compensation) Regulations 1948 [PROVIDED THAT the first cut hay of the last season's growth shall be valued on its average market price on the Farm during that season without any deduction for the manurial value thereof] (*p*) *or* [PROVIDED THAT in the case of corn which is threshed by the Tenant after the termination of the tenancy by virtue of the provisions hereinbefore contained the Tenant shall leave the straw chaff and colder therefrom for the use of the Landlord or the incoming tenant without receiving any payment or allowance for the same] (*q*) *or* [PROVIDED THAT in substitution for the provisions contained in the said Regulations for the valuation of farmyard manure or compost the same shall be valued at the market

(*o*) The words in brackets will be used where it is desired to incorporate a holdover provision in a Michaelmas tenancy.

(*p*) This proviso gives effect to the custom which exists in some districts for the first cut hay to be valued at "market price", the remainder being valued at "consuming price". It is permissible to contract out of the methods of calculating tenant right matters laid down in the above-mentioned Regulations (see s. 25 (3) of the 1947 Act). The Committee on Agricultural Valuation, however, in their First Report, dated January 13, 1948, expressed the hope that the statutory methods would be in general accepted and that contracting out would be confined to cases where special provisions are essential.

(*q*) See clause 3 (14A), *ante*. In the absence of this proviso straw left by the tenant would be valued in accordance with Part II of the Schedule to the Agriculture (Calculating Value for Compensation) Regulations, 1948, at the average market value on the farm during the season, less the manurial value calculated in accordance with Table 3 in that Schedule. The proviso in the text is, of course, only appropriate in the case of Michaelmas tenancies containing a holdover clause.

price thereof delivered or the Farm at the date of the termination of the tenancy] (*r*).

General conditions.

AND IT IS HEREBY ALSO AGREED as follows :—

Exclusion of obsolete buildings, etc.

5. Nothing herein contained shall impose any liability upon either the Landlord or the Tenant

(1) To maintain repair or insure the buildings specified in the Second Schedule hereto which are hereby declared to be obsolete

(2) To execute any work if and so far as the execution of such work is rendered impossible (except at prohibitive or unreasonable expense) by reason of subsidence of any land or by the blocking of outfalls which are not under the control of either the Landlord or the Tenant (*s*).

Exclusion of certain repairs.

6. The Landlord shall be under no liability to execute repairs or replacements or to insure buildings or fixtures which are the property of the Tenant or to execute repairs or replacements rendered necessary by the wilful act or negligence of the Tenant or any members of his household or his employees (*t*).

Market garden.

7. Nothing herein contained shall be deemed to be a consent by the Landlord to the Farm or any part thereof being treated as a market garden [PROVIDED THAT if the Tenant executes any of the following improvements with the consent in writing of the Landlord or his Agent namely :—

(1) Planting of fruit bushes permanently set out

(2) Planting of strawberry plants

(3) Planting of asparagus rhubarb or other vegetable crops which continue productive for two or more years

he shall on the termination of the tenancy be entitled to be paid by the Landlord the value thereof to an incoming tenant] (*u*).

Distress

8. In the event of any hay straw roots or green crops being seized by the Landlord under distress for rent such produce may be sold subject to a condition that it shall be consumed on the Farm or subject to some other condition which shall ensure that the manurial value thereof shall be returned to the Farm and upon a sale taking place subject to any such condition the Landlord may grant to a purchaser of such produce the use of the outbuildings barns yards or fields or any part thereof for the purpose of threshing and consuming the said produce without making any compensation to the Tenant.

Resumption of possession by landlord.

9. It shall be lawful for the Landlord at any time or times upon giving one calendar month's notice in writing of his intention in that behalf to enter upon and resume possession of and determine the

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(*r*) The Regulations above referred to provide that the value of farmyard manure or compost made on the farm shall be the reasonable expenditure incurred by the tenant in loading, carting, heaping and spreading such manure or compost on land from which no crop has been taken. In some districts, however, it is usual for manure to pass at its full market value. This system is sometimes said to result in the production of better manure, as the tenant has an interest in it. On the other hand, in some districts manure passes without any compensation to the outgoing tenant even for labour. If it is desired to provide for this an appropriate clause must be inserted.

(*s*) See Part III (General Proviso) of the Schedule to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948. This is part of the statutory repair clauses set out in these Regulations. It could, of course, be used also if desired in cases where the agreement varies the statutory clauses in some respects.

(*t*) See paragraph 4 (1) of Part I of the above Regulations.

(*u*) It may be desired, although s. 48 of the 1923 Act is excluded, to confer on a tenant the modified rights set out in the above proviso.

tenancy in respect of any part or parts of the Farm (except the farmhouse and garden and the farm buildings) for building purposes (*a*).

Provision for re-entry.

10. If any part of the rent shall be in arrear for twenty-one days after the same shall have become due (whether demanded or not) or if there shall be a breach by the Tenant of any of the obligations herein contained or if the Tenant shall become bankrupt or enter into any arrangement or composition with his creditors or permit any execution to be levied on the Farm then it shall be lawful for the Landlord to re-enter upon the Farm or any part thereof in the name of the whole and thereupon the tenancy shall absolutely determine but without prejudice to the rights and remedies of the Landlord in respect of any breach by the Tenant of any of his obligations hereunder (*b*).

Right of set-off.

11. Any sums due to the Landlord from the Tenant in respect of rent or any breach by the Tenant of any of his obligations herein contained or for injury to or deterioration of the Farm or otherwise in respect of the Farm may (whether such sums be liquidated or not) be deducted by the Landlord from or set off against any sums payable to the Tenant by the Landlord in respect of the Farm or may at the discretion of the Landlord be recovered by action or otherwise.

Claims for damage by game.

12. Notices in writing of claims for compensation for damage by game shall be given to the Landlord within one month after the expiration of the twelve calendar months ending on the 30th day of September instead of at the end of the calendar year (*c*).

Record of holding.

13. If the Landlord or the Tenant shall require a record of the condition of the Farm to be made pursuant to section 32 of the Agricultural Holdings Act 1923 the cost of making such record shall be borne by the party requiring the same.

Exclusion of custom.

14. The rights and obligations of the Landlord and the Tenant under this Agreement or otherwise in respect of the Farm shall be in no way affected by any custom of the country (*d*).

IN WITNESS *etc.*

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

(Clause 1)

No. on Ordnance Survey Map Sheet ..... 19.... Edition.	Description.	Arable.	Meadow Grass or Pasture.	Acreage.

(*a*) See s. 27 of the 1923 Act as amended by the 1947 Act.

(*b*) Paragraph 9 of the Sixth Schedule to the 1947 Act requires a re-entry clause of the above kind to be inserted in all written tenancy agreements.

(*c*) See s. 11 of the 1923 Act.

(*d*) It is still necessary to have a clause of this kind if it is desired to exclude such customary rights as pre-entry. S. 27 of the 1947 Act only eliminates customary rights to *compensation*. Customs of the country not affecting compensation will still be deemed to be incorporated in tenancy agreements unless expressly excluded. It is far better to exclude custom entirely, as above, and set out in the agreement the precise terms of any provision such as pre-entry or holdover which it is desired to include.

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

(Clause 5 (1))

[*Description of buildings which are declared to be obsolete.*]

Form 26

Short Form of Tenancy Agreement of an Agricultural Holding adopting without Variation the Provisions of the Agriculture Act, 1947, and the Regulations made thereunder (*a*).

(*Drafted by Dennis B. Pugh, Barrister-at-Law.*)

AN AGREEMENT made the —— day of —— between A of *etc.* (hereinafter called "the Landlord" which expression *etc.*) of the one part and B of *etc.* (hereinafter called "the Tenant" which expression *etc.*) of the other part WHEREBY IT IS AGREED AND DECLARED as follows:—

1. The Landlord agrees to let and the Tenant agrees to take ALL THAT (particulars of holding with sufficient description by reference to a map or plan of the fields or other parcels of land comprised therein to identify the extent of the holding (*b*)) TOGETHER WITH the fixed equipment (*c*) thereon [EXCEPT AND RESERVING unto the Landlord all timber and other trees and all mines and minerals with free access to cut work and carry away the same respectively AND EXCEPT ALSO AND RESERVING to the Landlord subject to the provisions of the Ground Game Act 1880 and the Ground Game (Amendment) Act 1906 the exclusive right to all game and rabbits and to preserve the same on the said holding with liberty to shoot fish hunt and sport thereon *or such other exceptions and reservations as may be appropriate see clause* 2 *of Form* 25 *p.* 369.]

THE TENANCY to be from the —— day of —— 19— for one year certain and thereafter from year to year until it is determined at the end of the second or any subsequent year by either party giving to the other of them not less than twelve calendar months' notice in writing (*d*)

AT THE YEARLY RENT of £— (*e*) payable half-yearly on the —— day of —— and the —— day of —— in each year the first of such payments to be made on the —— day of —— next [*or by quarterly payments*].

2. THE TENANT hereby agrees with the Landlord as follows:—

(i) that he will pay the rent at the times and in manner aforesaid

(*a*) This short form is intended to cover only the matters for which by s. 38 and the Sixth Schedule to the 1947 Act provision should be made in written tenancy agreements, with the addition of a few optional clauses usually included in such short agreements. For a full precedent, see Form 25, p. 369, *supra*, and the notes thereto. Reference should also be made to the articles by J. Muir Watt, Barrister-at-law, at pp. 15, 170 and 289, *supra*. The Sixth Schedule is set out in full at p. 22–23 thereof.

(*b*) See para. 2 of the Sixth Schedule to the 1947 Act.

(*c*) Defined by s. 109 (3) of the 1947 Act.

(*d*) As to restrictions on tenancies for less than a year and notices to quit, see ss. 40 and 31 of the 1947 Act. See also articles at pp. 24, 26 and 290, *supra*.

(*e*) See article at p. 19, *supra*.

without any deduction whatsoever (except for land tax (*f*) and landlord's property tax)

(ii) that he will pay all rates (including drainage rates (*f*)) taxes assessments and outgoings whatsoever in respect of the said holding (except only as aforesaid)

(iii) that he will manage and cultivate the said holding in accordance with the rules of good husbandry as laid down by the Agriculture Act 1947 (*g*) (hereinafter called "the said Act") and so as not to injure or deteriorate the said holding

[(iv) that he will preserve all timber and timber-like trees and not cut or lop the same without the consent in writing of the Landlord (*h*)]

[(v) that he will not destroy any game or rabbits except as authorised by the Ground Game Act 1880 and the Ground Game (Amendment) Act 1906 (*h*)]

(vi) subject to the provisions of the said Act that he will not at any time plough break up pare or burn any part of the meadow grass or pasture land forming part of the said holding (*i*)

(vii), (viii) (*here insert special stipulations as to cropping and cultivation and acts of husbandry to be performed by the Tenant in the last year of the term; see clause* 3 (10)–(15) *of Form* 25 *p.* 375 *supra and Article "Position of the Cropping Clauses under the New Act" p.* 25 *supra*)

(ix) that he will consume all the hay straw and root crops upon the said holding (*k*)

(x) that he will spread the whole of the manure and muck yearly upon the said holding (*k*)

(xi) that he will insure and keep insured against damage or destruction by fire to the full value thereof all [live and] dead stock on the said holding and all harvested crops grown for consumption thereon and in the event of such damage or destruction that he will lay out the moneys received in respect of such insurance in replacing such [live and] dead stock (in the case of such moneys being insufficient for such purpose making good the deficiency out of his own moneys) and return to the said holding the full equivalent manurial value of such harvested crops in so far as the return thereof is required for the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry (*l*)

(xii) that he will not without the consent in writing of the Landlord assign underlet or part with possession of the said holding or any part thereof PROVIDED ALWAYS that such consent shall not be unreasonably or vexatiously withheld in the case of a respectable and responsible Tenant (*m*)

(xiii) that the Landlord shall have the right of ingress and egress

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(*f*) See para. 5 of Sixth Schedule.

(*g*) These rules are set out in s. 11 of the 1947 Act. See also article at p. 27, *supra*.

(*h*) As to compensation for damage by game, see s. 11 of the Agricultural Holdings Act, 1923, as amended by para. 3 of the Seventh Schedule to the 1947 Act. See also alternative provisions in clause 3 of Form 25, p. 376, *supra*.

(*i*) See article at p. 20, *supra*, and note (*g*) to Form 25, p. 375, *supra*.

(*k*) See article at p. 25, *supra*, and clause 3 (11) of Form 25, p. 375, *supra*.

(*l*) See para. 8 of Sixth Schedule to the Act and note (*f*) to Form 25, p. 374, *supra*.

(*m*) S. 19 of the Landlord and Tenant Act, 1927, does not apply to agricultural holdings; see sub-s. (4) of that section.

for himself and all persons authorised by him for the purpose of inspecting the state of repair and condition of the said holding [and of cutting working and carrying away timber and minerals and for sporting and preserving game]

(xiv) that he will at the determination of the tenancy hereby granted quietly yield up the said holding with the fixed equipment (*c*) which is or at any time during the said tenancy shall be thereon in a good and tenantable state of repair and condition except only tenants' fixtures.

3. THE LANDLORD hereby agrees with the Tenant as follows:—

(i) that he will insure and keep insured against damage or destruction by fire to the full value thereof all buildings (other than buildings which are or may be the property of the Tenant) on the said holding and in the event of such damage or destruction that he will reinstate or replace any such building so damaged or destroyed if such reinstatement or replacement is required for the fulfilment of his responsibilities to manage the said holding in accordance with the rules of good estate management (*n*) as laid down by the said Act and provided that such damage or destruction shall not have been due to the wilful act or negligence of the Tenant or of any members of his household or his employees (*o*)

(ii) that the tenant paying the rent hereby reserved and performing and observing the covenants on his part herein contained shall peaceably hold and enjoy the said holding without any interruption or disturbance by the Landlord or any person rightfully claiming under him.

4. The provisions of the Agriculture (Maintenance Repair and Insurance of Fixed Equipment) Regulations 1948 and of the Agriculture (Calculation of Value for Compensation) Regulations 1948 shall so far as applicable and not expressly or by implication varied hereby be deemed to be respectively incorporated in this Agreement (*p*).

5. [*Here insert such ingoing valuation clause as may be appropriate to the circumstances and if desired special provisions as to outgoing valuation* (*q*).]

6. Any sums due to the Landlord from the Tenant in respect of rent or any breach by the Tenant of any of the agreements on his part herein contained or for any injury or deterioration of the said holding or otherwise shall be deducted from any sums payable to the Tenant at the determination of the tenancy by the Landlord or incoming tenant or shall be recoverable by action or otherwise as the Landlord may deem fit.

7. If at any time during the tenancy either party shall require a record of the condition of the holding to be made pursuant to section 32

(*n*) These rules are laid down by s. 10 of the 1947 Act; see also article at p. 27, *supra*.

(*o*) See para. 7 of the Sixth Schedule to the 1947 Act, and note (*o*), *post*.

(*p*) SI No. 184/1948 and No. 185/1948. See also articles at pp. 21, 170 and 289, *supra*. It will be observed that Part I of the former regulations varies slightly the landlord's obligations as to insurance under para. 7 of the Sixth Schedule to the 1947 Act; see clause 3 (i) of this form.

(*q*) The Compensation Regulations will take the place of a detailed outgoing valuation clause; see article "Tenant Right Compensation" at p. 289, *supra*. The appropriate clauses will be found in Form 25, p. 379, *supra*.

of the Agricultural Holdings Act 1923 the cost of making such record shall be borne by the party requiring the same (*r*).

8. Neither party shall be entitled to claim any right based on the custom of the County or District (*s*).

9. If the rent hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall have become due (whether demanded or not) or in the event of any breach of any of the agreements on the part of the Tenant herein contained or of his becoming bankrupt or having a receiving order made against him or entering into any composition or arrangement for the benefit of his creditors the Landlord may re-enter upon the said holding (*t*).

AS WITNESS *etc.*

(*r*) This section of the 1923 Act remains in force.

(*s*) See article, "Custom", pp. 16 and 17, *supra*.

(*t*) See para. 9 of the Sixth Schedule to the 1947 Act. The provisions of s. 146 of the L. P. A. 1925 (relief against forfeiture) do not apply to the bankruptcy of a lessee under an agricultural lease or to the taking in execution of his interest; see sub-s. (9) of that section.

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